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J. C.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 411

GALVESTON WHARF COMPANY ET AL.,
PETITIONERS,

vs.

GALVESTON, HARRISBURG & SAN ANTONIO
RAILWAY COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

PETITION FOR CERTIORARI FILED SEPTEMBER 24, 1931

CERTIORARI GRANTED NOVEMBER 2, 1931

(36,225)

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[fol. 1]

IN DISTRICT COURT OF EL PASO COUNTY, TEXAS, SIXTY-FIFTH JUDICIAL DISTRICT

No. 27467

AMERICAN GROCERY COMPANY et als.

vs.

MALLORY STEAMSHIP COMPANY, a Corporation, et als.

PLAINTIFFS' FIRST AMENDED ORIGINAL PETITION—Filed April 8, 1927

Come now American Grocery Company, a corporation, Charles L. Pomeroy Company, a corporation, The H. Lesinsky Company, a corporation, Joseph Rehin, doing business under the name and style of Western Grocery Company, the F. S. Ainsa Company, Inc., a corporation, Adolph Nasits, doing business as Nasits Sales Company, Max Franklin and Harry Goodman, doing business under the name and style of Franklin & Goodman, and C. H. Lawrence, hereinafter styled plaintiffs, and after leave of the Court first had and obtained, file this, their First Amended Original Petition in lieu of their original petition heretofore filed on the 25th day of August, 1926, and complaining of Mallory Steamship Company, a corporation, having an agent in El Paso County, Texas, to-wit, Richard W. Curtis, 363 First National Bank Building, El Paso, Texas, Galveston, Harrisburg & San Antonio Railway Company, a corporation having an agent in El Paso County, Texas, to-wit, C. B. Jonz, upon whom service may be had, and Galveston Wharf Company, a corporation duly incorporated under the laws of the State of Texas, and having its office and place of business in Galveston County, Texas, of which George Sealy is president and C. W. Branch is secretary, hereinafter styled defendants, respectfully represent:

[fol. 2]

I

That the plaintiffs, American Grocery Company, Charles L. Pomeroy Company, The H. Lesinsky Company and F. S. Ainsa Company, Inc., are corporations duly and legally

incorporated under the laws of the State of Texas and doing business in El Paso County, Texas, and that Joseph Rehin, Adolph Nasits, Max Franklin and Harry Goodman and C. H. Lawrence are residents of the County of El Paso, Texas.

II

That on or about the 23rd day of December, A. D. 1925, the plaintiffs purchased from the Maine Cooperative Sardine Company of Eastport, Maine, 1105 cases of Oil Keyless Sardines at $4.10 a case, or a total of $4530.50, and 20 cases of Key Dec Sardines at $4.60 a case, or a total of $92.00; that said merchandise was consigned to the American Grocery Company, a corporation, at El Paso, Texas, and was what was known as a pool car, that is said car of merchandise was purchased by all of the plaintiffs herein from the Maine Cooperative Sardine Company and same was to be shipped to the American Grocery Company at El Paso, Texas, for distribution among these plaintiffs. That the reasonable wholesale market value at place of destination, to-wit, El Paso, Texas, on date delivery was due, was $4.72 per case for the 1105 cases of sardines, and $5.27 per case for the 20 cases of sardines.

III

Plaintiffs further allege that on or about the 23rd day of December, 1925, the Maine Cooperative Sardine Company delivered to the Seaport Navigation Company at Eastport, Maine, for delivery to the American Grocery Company at El Paso, Texas, the merchandise above mentioned, and that at the time said merchandise was so delivered to the Seaport Navigation Company by the Maine Cooperative Sardine Company a bill of lading was issued Shipper's [fol. 3] Order Notify American Grocery Company, El Paso, Texas; that said merchandise was routed according to said bill of lading, Seaport Navigation Company, Mallory Steamship Company and Southern Pacific Lines, and that the defendant, Galveston, Harrisburg & San Antonio Railway Company is a part of the Southern Pacific Lines or System; that said merchandise was sent from Eastport, Maine, and delivered to the Mallory Steamship Company at New York City on or about the 6th day of January, 1926,

and from there transported by the Mallory Steamship Company aboard their steamship, Concho, to Galveston, Texas, at which place said shipment of sardines were to be delivered to the next carrier in the route of destination, to wit, the Galveston, Harrisburg & San Antonio Railway Company, or the agent of such carrier, to-wit, the Galveston Wharf Company; that said merchandise arrived in good condition in Galveston, Texas, on or about the 13th day of January, 1926, and that on or about the 13th day of January, 1926, the Galveston Wharf or docks, or a part thereof, were destroyed by fire, and said merchandise was also destroyed by said fire while in the possession of some one of these three defendants, to-wit, Mallory Steamship Company, Galveston, Harrisburg & San Antonio Railway Company, and Galveston Wharf Company, and said merchandise, by reason of being destroyed by said fire, were lost to these plaintiffs, and these plaintiffs have never received said merchandise, or any part thereof.

IV

Plaintiffs further allege that at the time said merchandise was delivered to the Seaport Navigation Company at Eastport, Maine, a through bill of lading was issued by said company, which said original bill of lading and original invoice are now in the hands of some one of these defendants, to-wit, either the Mallory Steamship Company, Galveston, Harrisburg & San Antonio Railway Company, or Galveston Wharf Company, which original bill of lading and invoice, these defendants are hereby notified to produce [fol. 4] and have same in Court or secondary evidence will be introduced to prove said bill of lading and invoice, and by virtue of said bill of lading the defendants and each of them, both jointly and severally, were bound to safely deliver to plaintiffs at El Paso, Texas, said sardines in a good and safe condition, which plaintiffs allege that these defendants have wholly failed to so do, and that said merchandise, or any part thereof, has never been delivered to the American Grocery Company, or to any one of these plaintiffs.

V

Plaintiffs further say that these defendants and each of them, did not safely or securely carry and convey from

New York City to El Paso, Texas, on board their said vessel or their said railroads, or otherwise, nor did they safely or securely deliver to the said plaintiffs, or to any person for these plaintiffs as they were in duty bound so to do the said merchandise above set out; whereby the said merchandise became wholly lost to plaintiffs by reason of defendants' failure to safely and securely carry and convey the said merchandise as they were in duty bound and obligated so to do, to the plaintiffs' damage in the sum of $5861.00.

Wherefore, premises considered, and all parties being properly before the Court, plaintiffs pray that upon final hearing hereof they have judgment against the said Mallory Steamship Company, Galveston, Harrisburg & San Antonio Railway Company and Galveston Wharf Company, all or either of same as the facts may justify, in the sum of $5861.00, together with legal interest from January 13th, 1926, attorney's fees, costs of suit, and for such other and further relief, both general and special, in law and in equity, to which plaintiffs may be entitled and in duty bound will ever pray.

(Signed) Fryer & Cunningham, Attorneys for Plaintiffs.

[fol. 5] [File endorsement omitted.]

IN DISTRICT COURT OF EL PASO COUNTY

[Title omitted]

PLAINTIFFS' TRIAL AMENDMENT—Filed May 3, 1927

Comes now the American Grocery Co., a corporation, and the other plaintiffs named in plaintiffs' First Amended Original Petition and after leave of Court first had and obtained, file this their First Trial Amend-ed- and shows to the Court as follows:

That the fair and reasonable market value of the sardines described in Plaintiffs' First Amended Petition, at El Paso, Texas, the place of destination, on the date delivery should have been made, to-wit, January 18th, 1926, was as follows: 1105 cases at $5.25 per case, less 48 cents per case.

freight, and 20 cases of sardines, at $5.75 per case, less freight of 48 cents per case.

Wherefore plaintiff- prays judgment as prayed for in their First Amended Original Petition, filed in this Court on the 8th day of April, 1927.

(Signed) Fryer & Cunningham, Attys. for Plaintiffs.

[File endorsement omitted.]

[fol. 6] IN DISTRICT COURT OF EL PASO COUNTY

[Title omitted]

FIRST AMENDED ORIGINAL ANSWER AND CROSS-ACTION OF DEFENDANT MALLORY STEAMSHIP COMPANY—Filed October 9, 1926

Comes now Mallory Steamship Company, one of the defendants herein, leave of Court first obtained, and files this its first amended original answer, as well as cross-action, and thereon presents:

I

Said defendant excepts to plaintiffs' petition filed herein, and says same is not good in law, shows no cause of action, and of this prays judgment of the Court.

For answer, if required, said defendant denies each and singular the allegations in said petition contained, and says same are not true in fact, and of this puts itself upon the country.

(Signed) Turney, Burges, Culwell, Holliday & Pollard, Attorneys for Defendant Mallory Steamship Company.

II

Specially answering if required, said defendant represents that it is not liable herein for this:

It was an intermediate carrier in the handling of the shipment described in plaintiffs' petition. Said shipment was by it received in due course of business from the next preceding carrier under a bill of lading or shipping contract executed by the initial carrier, same was by this de-

fendant handled in due course of business and carried from the port of New York to the port of Galveston, at which latter place its handling thereof ceased. It made prompt and safe delivery of each and all of said shipment to the next carrier in the route of handling to destination, to-wit, [fol. 7] its co-defendant, Galveston, Harrisburg & San Antonio Railway Company, or to the agent of such carrier, as directed and required, to-wit, the Galveston Wharf Company. That each and all of said shipment was by this defendant placed at the usual and designated place on the wharf belonging to the Galveston Wharf Company, and at the time of said placement each and all of said shipment was in good condition. That said placement of said shipment was made and completed prior to four o'clock on the afternoon of January 13, 1926. That this defendant had nothing further to do with the handling of said shipment, or the transportation thereof after same had been so delivered on the wharf. That after the delivery of same at the wharf the same was duly O. K.d either directly by the defendant, Galveston, Harrisburg & San Antonio Railway Company, or under the direction of said railway company by its agent, the Galveston Wharf Company. That thereafter this defendant had no control over said shipment, but that same was beyond its control. That the handling of the same, as hereinabove alleged, was in the due, regular and orderly course of business, and as such business had been conducted over the wharf, which said wharf belonged to the Galveston Wharf Company, for many years. That due notice of the arrival and intended arrival of said shipment on this defendant's steamship Concho had been duly given, as was the custom, before the arrival of said steamship, and both the defendant, Galveston, Harrisburg & San Antonio Railway Company and the Galveston Wharf Company knew in advance said shipment was on said steamship, that same was destined to a point on the Galveston, Harrisburg & San Antonio Railway and said shipment was by said railway company duly received in due course of business. That if any loss occurred to said shipment, or if same was not delivered at destination, it was through no fault or neglect of this defendant. That its full duty, in law and in fact had been performed relative thereto when [fol. 8] placement thereof was made on the docks of the Galveston Wharf Company, which was the usual place for

the receipts of such freights, and thereafter said shipment was no longer in the possession of this defendant, and it could not control the future handling or safety thereof.

And these facts are pleaded in bar of recovery by the plaintiff against this defendant, and thereon it asks to be discharged.

(Signed) Turney, Burges, Culwell, Holliday and Pollard, Attorneys for Defendant Mallory Steamship Company.

III

Further answering herein if need be, this defendant, still averring the facts set out in the paragraph next above herein without the necessity of repeating same, respectfully represents that it made delivery of the shipment in question on the docks of the Galveston Wharf Company at Galveston, Texas, as in duty bound it was required to do.

That the Galveston Wharf Company is a corporation duly incorporated under the laws of the State of Texas, having its office and place of business in Galveston County, Texas, and of which George Sealy is President and C. W. Branch is Secretary. That said Galveston Wharf Company is a common carrier. That as such common carrier it operates as a transportation company along the wharves at Galveston, Texas. That it maintains railroad tracks along said wharves, same connecting with each and all of the railroads operating out of Galveston, and among others its tracks connect with those of the defendant Galveston, Harrisburg & San Antonio Railway Company. That among others the said Galveston Wharf Company has tracks running alongside of what is known as Pier 23, as well as under the shed at what is known as Pier 23, over which tracks the Galveston Wharf Company operates engines and cars. That it is part of the business of the Galveston Wharf Company to carry and transport shipments arriving by steam- [fol. 9] ship at Galveston and destined to interior points from the pier or wharf at which said shipments are unloaded from the steamer to the point of connection between the terminus of the tracks of said wharf company to those of the line over which said shipment is to be transported. And this defendant is informed, believes and so alleges that such handling by the wharf company is under contract be-

tween it and the railway line to which the same is delivered at Galveston for further transportation.

This defendant further avers that the shipment made basis of the cause of action herein was transported by this defendant's steamship Concho from the port of New York to the port of Galveston, at which latter port said shipment arrived, said ship being docked at what is known as Pier 23. Said shipment was in due course of business duly unloaded from said steamship onto the dock at Pier 23 on January 13, 1926. That the Galveston Wharf Company, as forwarder and as agent for the various railway lines extending out of Galveston, duly received said shipment and accepted the same in the usual and customary way of acceptance thereof, to-wit, by checking same on said January 13, 1926. That it so received said shipment as forwarding agent, or agent for the defendant Galveston, Harrisburg & San Antonio Railway Company. That this defendant was required as a fact to unload said shipment at the place where same was unloaded, and to deliver the same or tender same for delivery to the said Galveston Wharf Company, all of which it did. That the defendant Galveston, Harrisburg & San Antonio Railway Company had been duly notified in advance that said shipment was enroute, which said notice had likewise been given to the Galveston Wharf Company, and said Galveston, Harrisburg & San Antonio Railway Company employed the Galveston Wharf Company to receive said shipment from this defendant, and said shipment was so received.

This defendant further avers, however, that, if for any reason, either of law or fact, it shall be determined that [fol. 10] said delivery had not in every particular been completed, as hereinabove averred, yet this defendant alleges and here and now specifically avers that said shipment was destroyed in a fire occurring to the property of the Galveston Wharf Company on the night of January 13, 1926. That at the time of and preceding said fire, the Galveston Wharf Company had many bales of cotton stored under the sheds at Pier 23, which said cotton was very inflammable. That just prior to the time of the fire, the said Galveston Wharf Company had engines operating along its tracks in close proximity to said cotton, as well as in close proximity to where the shipment herein complained of was stored. That said cotton was caused to

ignite, either from sparks emitted from said engines or from other operations of said engines so owned, controlled and operated by the said Galveston Wharf Company. That the physical possession of the shipment in question was in and with the Galveston Wharf Company at the time of the fire in question, and that said fire was caused to start from the negligence of the wharf company in the operation of its engines in close proximity to said cotton, and if not, then for causes under the absolute and complete control of said wharf company and for which this defendant is not responsible. That in said fire the shipment made basis of this suit was destroyed, and because of the destruction thereof the said Galveston Wharf Company became and is liable for the value of said shipment—that is, as between said Galveston Wharf Company and this defendant. That if it shall be determined, as a matter of law, that this defendant is liable to the plaintiff herein for the loss so occurring, yet this defendant having physically placed said shipment at the place on the docks designated by the Galveston Wharf Company, and as it was required to do, that the said Galveston Wharf Company became thereby liable and bound to indemnify and save harmless this defendant as against loss occurring *fo* said shipment. That if it shall be established that this defendant is liable to the plaintiff [fol. 11] for the loss occurring, that the said Galveston Wharf Company should be required to indemnify and save harmless this defendant as against the payment of any sum growing out of said loss. That as a matter of fact said shipment was in the possession of the Galveston Wharf Company at the time of said fire, and it was required and in duty bound to protect the same against fire or other casualty. That its failure so to do was the occasion of the loss herein complained of, which loss was not even contributed to by any act or thing done by this defendant.

That it is necessary, therefore, in order that the rights of all parties may be protected, that the said Galveston Wharf Company be made a party hereto.

This defendant further avers that if it shall be held and determined that the handling of said shipment by the Galveston Wharf Company was not as forwarding agent or agent for the co-defendant, Galveston, Harrisburg & San Anton[illegible] Railway Company, then that it received said ship-

ment, and that same was in its possession at the time of the fire as a common carrier duly handling said shipment in course of transportation from point of origin to destination, and as such common carrier it became bound to use the diligence required of common carriers to protect said shipment from loss or destruction. That as such common carrier it failed to protect the shipment in question, but that same was destroyed through its negligence, in that it operated engines in such close proximity to cotton as to cause the same to ignite, and thereby occasion the resulting loss to this shipment. That if said fire did not originate from sparks emitted from an engine, yet that said cotton was caused to ignite while same was in the possession of the Galveston Wharf Company, that said Galveston Wharf Company so failed to protect the shipments then in its possession as in duty bound it was required to do, and because of which it became and now is liable for [fol. 12] the loss herein sued for.

Wherefore this defendant asks that the Galveston Wharf Company be made a party defendant herein, and that on hearing if there shall be recovery against this defendant that it have like recovery over and against said Galveston Wharf Company.

(Signed) Turney, Burges, Culwell, Holliday & Pollard, Attorneys for Defendant Mallory Steamship Company.

IV

Further answering herein if need be, and by way of cross action, and again relying upon the averments of Paragraph II and III hereof, it not being necessary to repeat, this defendant avers that physical delivery of the shipment in question had been made by it on the wharf at the place designated long prior to the destruction of same by fire. That it was the duty of its co-defendant, the Galveston, Harrisburg & San Antonio Railway Company, to receive said shipment either at the pier where same had been placed on the wharf by this defendant directly, or through the Galveston Wharf Company. That the physical handling of the said shipment by this defendant had been long since completed, notice thereof given to the said railway company, either directly or through agents, and same had been O. K.d as being in proper condition for further trans-

portation. And if this defendant is mistaken in its averments made basis of the third paragraph herein, and it shall be determined that the Galveston Wharf Company is not liable, either initially or as indemnifier, then and in that event this defendant avers that the failure to deliver said shipment at destination, and loss thereof at Galveston was occasioned through the negligence of the said Galveston, Harrisburg & San Antonio Railway Company, which said railway company was the delivering line, and was in duty bound to accept said shipment when tendered by this defendant, and on tender of such delivery by this defendant the said railway company became responsible [fol. 13] for the future handling thereof.

And if it shall be held and determined as a matter of law that the technical delivery of said shipment had not been completed as between this defendant and said railway company at the time of the destruction of the shipment, yet that actual delivery thereof had been completed, same was beyond the control of this defendant and it thereby became and was the duty of said railway company to protect said shipment against loss, and to indemnify this defendant in the event of loss.

That said railway company failed to protect said shipment, it failed to guard the same, it failed to use the care required by law to protect said shipment against loss by fire. That it knew that said shipment had been placed by this defendant at a point in close proximity to inflammable cotton. It knew that same had been placed at the point designated on the wharf by it and the Galveston Wharf Company for delivery. That the point selected on the wharf for the placement of this shipment was designated to the defendant by the Galveston, Harrisburg & San Antonio Railway Company and the Galveston Wharf Company, and this defendant was compelled to so place, which it did. That it was the duty of the Galveston, Harrisburg & San Antonio Railway Company, either directly or through its agent the Galveston Wharf Company, to receive and accept said shipment when so placed, and to promptly remove same enroute to destination. That said railway company failed to promptly so remove said shipment, but permitted same to remain in an exposed position in close proximity to many bales of cotton, knowing that engines were constantly passing at and near said point, and

that the danger of conflagration was always imminent. That it failed to exercise ordinary care in looking after said shipment and caring for same after the placement above averred, and that in the situation this defendant was helpless and was compelled to rely upon the co-defendant [fol. 14] herein to properly care for said shipment after such placement.

Wherefore this defendant avers that if the plaintiff is entitled to recover herein that the liability for the loss complained of it either on the Galveston Wharf Company or the co-defendant Galveston, Harrisburg & San Antonio Railway Company, as they were each active wrongdoers, as between them or either of them and this defendant, and this defendant is entitled to be indemnified by either and both of said carriers.

Wherefore it prays that in the event of recovery against it herein, that it have like recovery over against the said Galveston, Harrisburg & San Antonio Railway Company and the Galveston Wharf Company, or either of same as the facts may justify.

(Signed) Turney, Burges, Culwell, Holliday & Pollard, Attorneys for Defendant Mallory Steamship Company.

[File endorsement omitted.]

[fol. 15] IN DISTRICT COURT OF EL PASO COUNTY

[Title omitted]

SUPPLEMENTAL ANSWER OF MALLORY STEAMSHIP COMPANY—Filed May 3, 1927

Comes now the defendant Mallory Steamship Company, and adopts the allegations contained in the Supplemental Answer of the defendant, Galveston, Harrisburg & San Antonio Railway Company.

(Signed) Turney, Burges, Culwell, Holliday & Pollard, Attorneys for Defendant Mallory Steamship Company.

[File endorsement omitted.]

[fol. 16] IN DISTRICT COURT OF EL PASO COUNTY

[Title omitted]

DEFENDANT'S FIRST AMENDED ORIGINAL ANSWER—Filed April 29, 1927

To the Honorable Judge of said court:

Now comes the Galveston, Harrisburg & San Antonio Railway Company, one of the defendants in the above numbered and entitled cause, and by leave of the court first had, files this its first amended original answer, which is in reply to plaintiffs' petition and the answer and cross action of its co-defendant, Mallory Steamship Company, and for such amended answer says:

1

(a) This defendant demurs to plaintiffs' petition and for cause of exception says the same is insufficient in law and shows no cause of action against it, and of this it prays judgment of the court.

(b) For answer herein this defendant denies all and singular the allegations in plaintiffs' petition contained and says the same are not true and of this it puts itself upon the country.

(Signed) Kemp & Nagle, Attorneys for Defendant Galveston, Harrisburg & San Antonio Railway Co.

2

(a) Answering the answer and cross action of the defendant, Mallory Steamship Company, this defendant says it excepts to said cross action and for cause of exception says same is insufficient in law and shows no cause of action against it, and of this it prays judgment of the court.

[fol. 17] (b) It specially excepts to Paragraph IV of said answer and cross action of defendant, Mallory Steamship Company, in that same alleges no fact, and sets up no fact or set of facts showing any liability on the part of this defendant, or showing no right which the Mallory Steamship Company has over against this defendant and of this exception it prays judgment of the court.

(c) This defendant denies all and singular the allegations contained in the answer and cross action of its co-defendant, Mallory Steamship Company, and says the same are not true, and of this it puts itself upon the country.

(Signed) Kemp & Nagle, Attorneys for Defendant Galveston, Harrisburg & San Antonio Railway Co.

3

Further answering the petition of plaintiff and the answer and cross action of its co-defendant, Mallory Steamship Company, this defendant says that the said freight mentioned in plaintiffs' petition was being transported by its co-defendant, Mallory Steamship Company, under a bill of lading wherein the said Mallory Steamship Company agreed: "to deliver to another carrier on the route to said destination", the said goods so being transported by it; that the said Mallory Steamship Company did transport said goods to it- wharf in the City of Galveston, and commenced -loading its said cargo on the morning of the 13th of January, 1926, which unloading was done by the said Mallory Steamship Company on the wharf of the said Mallory Steamship Company, and which wharf, while owned by co-defendant, Galveston Wharf Company, was leased to or under the control of the said Mallory Steamship Company, at least that portion of the said wharf where said cargo was unloaded was so owned or controlled by the said Mallory Steamship Company, and was known as the Mallory Line Dock. That the said Mallory Steamship Company continued to unload its said cargo during the said [fol. 18] entire day of January 13th, 1926, and did not finish unloading its said cargo until about six o'clock on the afternoon of said day, or later, and did not finish unloading that port of its cargo involved in this suit until late in said afternoon at a time when same could not have been loaded on to the cars of this defendant or received by this defendant, and in this connection, this defendant denies that its co-defendant, Galveston Wharf Company, was its agent or authorized by it to receive such shipments for it, and denies that said Galveston Wharf Company did so receive said shipment.

This defendant further alleges that the said defendant Mallory Steamship Company, in unloading said shipment

placed the same on its wharf at such places as suited its convenience and not at any place designated by this defendant or the Galveston Wharf Company, and that the said shipment was not delivered to this defendant but the same was and remained under the control and supervision of the Mallory Steamship Company until same were destroyed by fire, and that the said Mallory Dock where same was unloaded and remained was policed by the defendant, Mallory Steamship Company, or in any event it was its duty to police same, and if it failed so to do it was negligent and its said negligence was a proximate cause of the subsequent destruction of the said shipment by fire.

That it was the duty of said Mallory Steamship Company and of the defendant, Galveston Wharf Company, or one of them, to have protected said shipment against loss by fire, or other causes, and to have seen that the same were so protected, and their failure so to do was a proximate cause of the loss and destruction of said property involved in this suit.

[fol. 19] This defendant says that at the time of the destruction of the goods involved in this suit the same were still in the possession, custody and control of the defendant, Mallory Steamship Company, or in any event had not been delivered to this defendant; that same were upon the Mallory line dock; that the same had not been loaded on to the cars of this defendant, had not been received by it, and it had been given no opportunity to check the same or to ascertain that the full quantity called for by the bill of lading was in said shipment, or the condition of said goods. That under the bill of lading under which the defendant, Mallory Steamship Company, had received and held said goods, it was provided that it should deliver the same to another connecting carrier and no delivery had been made at the time of their destruction. That the same had been unloaded from the steamer and placed on the docks too late to be turned over to or delivered to the Railroad company in the regular course of business on the day when same were unloaded. That the Railroad Company had not checked or receipted for the same, and the defendant Mallory Steamship Company, would not have permitted a connecting carrier to take such goods from its premises without having first receipted therefor.

Wherefore this defendant says that it is not liable to the

plaintiff in any sum, but if for any reason it be held that there is any legal liability on this defendant, then it says by reason of the fact hereinbefore alleged and the failure of its co-defendant to properly police, guard, and protect said property as it was in duty bound to do, there was active negligence on their part and this defendant is entitled to judgment over against them for any sum for which it may be adjudged liable, for which it prays, and for costs of suit, and for general and equitable relief.

(Signed) Kemp & Nagle, Attorneys for Defendant Galveston, Harrisburg & San Antonio Railway Co.

4th

[fol. 20] This defendant says that it is informed and believes, and so believing alleges the fact to be, that the fire in question was caused by sparks emitted by the engine of its co-defendant, Galveston Wharf Company, or from the failure of the Mallory Steamship Company and the Galveston Wharf Company, or one of them, to properly guard and protect said premises as they were in duty bound to do, and from their negligent failure to extinguish said fire or remove said goods from the premises as they were in duty bound to do, and that their negligence was active and if for any reason it be held that this defendant is liable, then it says that it is entitled to judgment over against its co-defendant, Mallory Steamship Company and Galveston Wharf Company, for which it prays, and it also prays for cost of suit, and general and equitable relief.

(Signed) Kemp & Nagle, Attorneys for Defendant Galveston, Harrisburg & San Antonio Railway Co.

[File endorsement omitted.]

[fol. 21] In District Court of El Paso County

[Title omitted]

Supplemental Answer of Defendant G., H. & S. A. Ry. Co. —Filed May 3, 1927

Comes now the defendant, Galveston, Harrisburg & San Antonio Railway Company, and files this, its Supplemental

Answer, and excepts to Paragraph 4 of the answer of the defendant, Galveston Wharf Company, and says that it was not a party to said tariffs and not bound thereby, and said Paragraph 4 in no wise connects the defendant, Galveston, Harrisburg & San Antonio Railway Company with said tariffs or pleads any fact to show it was connected therewith or had notice thereof.

Further answering, if needs be, defendant, Galveston Harrisbu-g & San Antonio Railway Company, in reply to said answer of the Galveston Wharf Company, denies all and singular the allegations therein contained and says same are not true.

(Signed) Kemp & Nagle, Attorneys for Defendant Galveston, Harrisburg & San Antonio Railway Company.

[File endorsement omitted.]

[fol. 22] In District Court of El Paso County.

[Title omitted]

First Amended Original Answer of Galveston Wharf Co.—Filed May 3, 1927

1. Defendant demurs to each of the allegations in plaintiffs' petition and in the cross action against it, and says the same is insufficient in law.

2. Defendant denies each of the allegations against it in the plaintiffs petition, and in the cross action against it.

3. Defendant says that at the time of the fire which damaged the property described in plaintiffs' petition, said property was not in its possession or control, and had never been in its possession or control.

4. Defendant says that under the course of dealing between the Mallory Steamship Lines and the G. H. & S. A. Railway Co., the other defendants herein, and under the tariffs of this defendant under which said defendants did business with this defendant, it was understood and agreed

by all parties transacting the business of handling freight over the wharves and piers at Galveston, Texas, that property situated as was the property described in plaintiffs' petition, was not at the risk of this defendant.

5. That at the time of the damage to the property described in plaintiffs' petition, said property was located in space leased by this defendant to the Mallory Steamship Co., one of the defendants herein, under a written contract by the terms of which it was provided that this defendant should not be liable for any loss or damage to such goods thus located.

Wherefore defendant says that plaintiff nor the defendants is entitled to recover against this defendant for the [fol. 23] damage to such goods, and prays for relief, general and special.

(Signed) Thompson, Knight, Baker & Harris, Geo. S. Wright, for Deft. Galveston Wharf Co.

[File endorsement omitted.]

IN DISTRICT COURT OF EL PASO COUNTY

[Title omitted]

Trial Amendment of Galveston Wharf Co.—Filed May 3, 1927

The Galveston Wharf Co., with leave of court, files this its trial amendment and alleges:

1. That under the terms of the contract between the Galveston Wharf Company and the Mallory Steamship Company and the rules and tarif-s of the Galveston Wharf Co. by which the Mallory Steamship Company was bound by virtue of said contract alleged in defendant, Galveston Wharf Company's First Amended Answer, the Galveston Wharf Company was not to be responsible for any loss and damage to goods passing over said pier 24, and others named in said contract, and the Mallory Steamship Company was to be responsible therefor.

Wherefore defendant, Galveston Wharf Company, prays as in its first amended answer and that if judgment be

rendered against it, that it have judgment against the Mallory Steamship Company for such amount as judgment is rendered against the Galveston Wharf Company, and for relief, general and special.

(Signed) Thompson, Knight, Baker & Harris, Geo. S. Wright, Attys. for Defendant Galveston Wharf Company.

[File endorsement omitted.]

[fol. 24] IN DISTRICT COURT OF EL PASO COUNTY, TEXAS, SIXTY-FIFTH JUDICIAL DISTRICT

No. 27467

AMERICAN GROCERY COMPANY et al., Plaintiffs,

vs.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY et al., Defendants

JUDGMENT

Be it remembered that on, to-wit, May 3rd, 1927, the above styled and numbered cause being regularly called for trial, whereupon came the plaintiffs, American Grocery Company, a corporation, Charles L. Pomeroy Company, a corporation, The H. Lesinsky Company, a corporation, F. S. Ainsa Company, Inc., a corporation, Joseph Renin, doing business under the name and style of Western Grocery Company, Adolph Nasits, doing business as Nasits Sales Company, Max Franklin and Harry Goodman, doing business under the name and style of Franklin & Goodman, and C. H. Lawrence, and the defendants, Galveston, Harrisburg & San Antonio Railway Company, Mallory Steamship Company and Galveston Wharf Company, and each and all of same, and announced ready for trial, whereupon a jury being waived, and all the issues of fact as well as of law were submitted to the Court.

Be it further remembered that at the conclusion of the evidence, the plaintiffs presented motion for judgment against all of the defendants, which motion was overruled, and to which the plaintiffs excepted.

Be it further remembered that the Court, after considering the evidence and argument of counsel, and being of the opinion that the plaintiffs are entitled to recover herein against the defendant, Galveston Wharf Company, the sum of Five Thousand Three Hundred Seventy-six Dollars and Twenty-five cents ($5,376.25) *($5,376.25)*, and that the defendants, Mallory Steamship Company and the Galveston, [fol. 25] Harrisburg & San Antonio Railway Company should go hence without day and recover their costs, and the Court doth so find:

It is therefore, considered, ordered, and adjudged by the Court that the plaintiffs, American Grocery Company, a corporation, Charles L. Pomeroy Company, a corporation, The H. Lesinsky Company, a corporation, F. S. Ainsa Company Inc., a corporation, Joseph Renin, doing business under the name and style of Western Grocery Company, Adolph Nasits, doing business as Nasits Sales Company, Max Franklin and Harry Goodman, doing business under the name and styled of Franklin & Goodman, and C. H. Lawrence, do recover of and from the defendant, Galveston Wharf Company a corporation, the sum of Five Thousand Three Hundred Seventy-six Dollars and Twenty-five Cents ($5,376.25), with interest thereon at the rate of six per cent (6%) per annum from January 18th, 1926, until paid, and all costs of suit, for which let execution issue.

It is further ordered, adjudged and decreed by the court that the defendants, Mallory Steamship Company and Galveston, Harrisburg & San Antonio Railway Company do each and both go hence without day and recover their costs, and that as to each of said defendants the plaintiff take nothing, and each and both of said defendants recover their costs herein, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the defendant, Galveston Wharf Company take nothing in its cross-action as against the defendant, Mallory Steamship Company, but that as to same the said Mallory Steamship Company go hence without day. It is further ordered, adjudged and decreed by the Court that the motion as filed herein by the defendant, Galveston Wharf Company, for judgment in its favor be, and the same is, refused and overruled, and to the action of the Court in entering judgment herein against it and in favor of the plaintiff, and to the action of the Court in refusing to allow

[fol. 26] to it a recovery over against the defendant, Mallory Steamship Company, the defendant, Galveston Wharf Company, in open court then and there duly excepted and gave notice of appeal to the Court of Civil Appeals of the Eighth Supreme Judicial District of Texas; and to so much of the judgment as denied the plaintiffs' recovery against the Mallory Steamship Company, a corporation and the Galveston, Harrisburg & San Antonio Railway Company, a corporation, the plaintiffs in open court then and there duly and legally excepted and gave notice of appeal to the Court of Civil Appeals of the Eighth Supreme Judicial District of Texas. The motion of the defendant, Mallory Steamship Company, requesting the Court to file its findings of fact and conclusions of law herein, is granted.

(Signed) W. D. Howe, Judge 34th Judicial District, Presiding.

[fol. 27] In District Court of El Paso County

[Title omitted]

Findings of Fact and Conclusions of Law—Filed June 22, 1927

In compliance with the motion presented, I file the following as findings of fact and conclusions of law in the above styled and numbered cause:

Findings of Fact

I. I find that on or about December 23, 1925, the Maine Co-operative Sardine Company delivered to the Seaport Navigation Company, a common carrier, at Eastport, Maine, 1105 cases of Oil Keyless Sardines, and 20 cases Key Dec Sardines, for which a through bill of lading was issued, shippers order, notify American Grocery Company, El Paso, Texas. That said merchandise was routed Seaport Navigation Company, Mallory Steamship Company and Southern Pacific Lines. That said shipment was by the Navigation Company delivered to the Mallory Steamship Company at New York City about the 6th of January, 1926. That same was transported by the Mallory Steamship Company on their steamship Concho to Galveston, Texas, where it arrived about 7:00 a. m., January 13, 1926.

II. That said Mallory Steamship Company began unloading the freights from said vessel at about 8:30 a. m. January 13, 1926, onto the wharves which had been set aside and provided for that purpose, and that the entire cargo of said vessel had been entirely unloaded and placed on the wharf prior to 5:30 p. m. of said date.

III. That the shipment of sardines above referred to had been unloaded by the Mallory Steamship Company and had [fol. 28] been by said Company put at the designated place on the wharf, and was in proper condition for further transportation to point of destination at and before 4:00 p. m. of said date.

IV. That the wharf at which the steamship Concho docked, and at which the cargo thereof was unloaded, including the shipment above referred to, was owned by the defendant Galveston Wharf Company, but the defendant Mallory Steamship Company and the defendant Galveston Wharf Company, under date of July 1, 1914, entered into a written agreement under which, for the consideration of $5,000.00 per year, payable in monthly equal installments, and for a period of five years, ending on the 30th day of June, 1919, the Wharf Company agreed to permit and allow the Mallory Steamship Company and its affiliated lines to berth its and their vessels alongside, among others, the pier 24, at which the cargo above referred to was unloaded.

Paragraph B of Article III of said contract reads as follows:

"It is distinctly agreed and understood that the payment of the said sum of Five Thousand and no/100 Dollars ($5,000.00) per annum hereinabove provided for is to be made as shed hire, and in addition thereto, the Wharf Company shall be entitled to collect from the Steamship Company and the Steamship Company will promptly pay to the Wharf Company the regular wharfage and other rates and charges specified in the tariffs published or hereafter to be published by the Wharf Company for all goods, commodities, wares and freight loaded into or out of vessels of the Steamship Company, or its affiliated lines, which shall berth at said piers, and will comply with all rules shown in such tariffs."

and Article VI of said contract reads as follows:

"It is agreed that the Wharf Company shall in no way be responsible for any loss or damage to any goods or cargoes handled over and through said wharves, sheds and [fol. 29] warehouses, unless same be caused by defects in roof of warehouses; and that should the Steamship Company allow any of said wharves to be overloaded at any time so as to cause damage thereto, or to said sheds, the Steamship Company will pay all damages caused thereby and the cost of repairing such wharf or shed."

Article XIV thereof reads as follows:

"After the expiration of the said five year period, this contract shall continue in effect, according to the terms and conditions herein specified as long as the business of the Steamship Company, or its affiliated lines at the port of Galveston justifies the same and when such business fails to justify the same, this contract may be terminated by either party by giving to the other party sixty (60) days' written notice of its intention so to terminate it."

That, since the execution of said agreement, the Steamship Company has been using, among others, the said pier for the purposes and as provided in the above mentioned contract.

V. That the Galveston Wharf Company is a chartered transportation Company, owning, in addition to the piers located on the Galveston Bay side of the island, about fifty-one (51) miles of railroad trackage, extending from said piers along and through its yards in Galveston to connections with the lines of railroad operating out of Galveston, including the Galveston, Harrisburg & San Antonio Railway Company. That said Galveston Wharf Company owns and operates eight (8) switch engines, providing therefor the necessary yard and engine forces.

That it had on file with the Inter-State Commerce Commission and with the Texas Railroad Commission, duly promulgated tariffs covering its charges for the various services performed and to be performed by it. That it makes the regular reports to the Inter-State Commerce Commission that are ordinarily made and required of all

common carriers by railroad. That it has a general man-
[fol. 30] ager superintendent of terminals, treasurer and the usual other officers as required and necessary in the conduct of that character of business.

That its railroad tracks extend to and along the Pier 24, where the shipment in question had been unloaded from the steamship.

VI. That at the time the steamer Concho departed from New York on the voyage in question, there was, by said Company, sent by United States mail to its office at Galveston, complete billing of all the shipments on board said vessel. Said billing contained, among others, point of origin of the shipment, name of the shipper, destination and name of the consignee and the routing thereof over railway line out of Galveston. That this billing was received by the Mallory Steamship Company at Galveston about two or three days prior to the arrival of the vessel, and after a record thereof was made in its wharf office, all of said billing was immediately, and two days prior to the arrival of the vessel, delivered to the defendant Galveston Wharf Company for information and instruction as to the handling of each and all of the shipments contained in said vessel after same had been placed on the wharf by the Steamship Company, and that the defendant Galveston Wharf Company, after making a record of the contents of said billing, delivered same to the respective carrier which was to handle the respective shipments out of and beyond Galveston, and that the billing covering the shipment of sardines in question had been delivered by the Mallory Steamship Company to the Galveston Wharf Company two days prior to the arrival of said vessel, and said Galveston Wharf Company had delivered the same to the defendant, Galveston, Harrisburg & San Antonio Railway Company, which was the railway that was to carry said shipment of sardines from Galveston to El Paso.

That prior to the arrival of said steamship Concho at Galveston both the defendants, Galveston Wharf Company
[fol. 31] and Galveston, Harrisburg & San Antonio Railway Company, knew that said shipment of sardines was in said ship and how same was to be routed out of Galveston to destination.

That the forwarding of said billing from New York, and the method of handling same as above detailed, was the same method that had been used customarily between the various carriers involved for many years, and there was no difference in the method of handling the cargo involved than the method that had been in use for many years, and that, as was usual and customary under such circumstances, the Galveston Wharf Company, through its Superintendent of Terminals, made requisition on the various railroads for the necessary cars to handle the shipments to be moved by them respectively out of Galveston, and that following this custom there had been delivered by the railroads operating out of Galveston to the Galveston Wharf Company seventy-six (76) cars, which cars were set to the wharf on the night of January 12 by the Wharf Company for the purpose of loading therein the various shipments routed over the respective railroad-, and which were to be delivered from the Steamship Concho, and that said cars were ready and at hand, including a car for the carriage of the shipment of sardines in question.

VII. That the vessel Concho was unloaded by a force of men provided and paid for by the Mallory Steamship Company, and as each particular shipment was unloaded it was placed, or spotted, in that territory on the wharf which had been usually and customarily set aside for that purpose—that is to say, the carload freight destined for transit out of Galveston over the Galveston Harrisburg & San Antonio Railway Company was usually and customarily placed by the Mallory Steamship Company in that territory on the wharf that had been generally designated by the Wharf Company for that purpose, and so on for the other railroads having freights for carriage on said vessel—and that the carload of sardines in question was, by the Mallory [fol. 32] Steamship Company duly placed in the territory so set aside for the reception and delivery of such freights which were to be carried out of Galveston by the Galveston, Harrisburg & San Antonio Railway Company, and that all the work to be done relative thereto by the Mallory Steamship Company had been fully completed and performed by 4:00 o'clock on the afternoon of January 13, 1926, and that thereafter, and having so made such placement, the Mallory Steamship Company had nothing what-

ever to do with the further handling or movement of said shipment.

VIII. That the defendant, Galveston Wharf Company, had a force of men at work on the wharf, whose duty it was to carry and handle the shipments unloaded from the steamer from the point where same had been placed on the wharf by the Mallory Steamship Company into the cars, and that such handling by the employees of the Galveston Wharf Company was wholly independent of any prior handling by the employees of the Mallory Steamship Company, and same was done as a matter of course, without any character of direction or advice from the Mallory Steamship Company or any of its officers or employees. That the entire physical handling of each and all of said shipments, including the one in question, from the place where located on the wharves by the Mallory Steamship Company, was under the entire direction and control of the Galveston Wharf Company, and that the shipments of sardines in question could have been loaded on the car by the Galveston Wharf Company, and by it moved from the wharf, at any time after 4:00 o'clock on the afternoon of January 13, 1926, and that the time when said shipment was to be loaded on to the car was entirely left to the judgment of the Galveston Wharf Company, and with which the Mallory Steamship Company had nothing to do. That the defendant Galveston Wharf Company exercised its own judgment and discretion as to when and how it would do the loading on to the cars, and during the day of January 13, 1926, the [fol. 33] Galveston Wharf Company actually loaded out some forty-five (45) cars of the freights which had been unloaded from the "Concho", all of which was done at best suited its convenience, and for which service it was paid the usual tariff rates by the railroad handling the respective shipments out of Galveston to destination.

IX. That the force of the Galveston Wharf Company which were engaged in loading freights which had arrived on the steamer Concho quit work at 7:00 p. m. on January 13, and that had they continued to work after that hour the Galveston Wharf Company would have been required to pay them overtime for the service, and that at the time said forces so quit work the freights that had not been loaded into cars were left on the wharf at the designated place,

where they had been placed by the Mallory Steamship Company, and that had the forces of the Galveston Wharf Company continued the work of loading until 8:45 or 9:00 o'clock that night, all of the cargo could have been and would have been loaded on cars.

X. That the car of sardines in question was not loaded out, and same was left by the Galveston Wharf Company on the wharf at the point where it had been placed by the Mallory Steamship Company, and that all of said shipment was destroyed by a fire which broke out at about 1:00 a. m. on the morning of January 14.

XI. That it was usual and customary for the Galveston Wharf Company to give to the Mallory Steamship Company receipts for goods and shipments after same had been delivered by the Steamship Company to the Wharf Company. However, the Steamship Company never required the Wharf Company to deliver a receipt or receipts before freights and shipments were removed from the wharf, and in fact no receipt was ever issued and delivered to the Steamship Company by the Wharf Company for freights [fol. 34] received until two or more days had usually passed after the shipments and freights had moved out of Galveston. The delivery of receipts for goods and shipments was not a prerequisite required by the Mallory Line before same could be moved from the wharf, and sometimes as much as a week passed after freights had been moved from the wharf by the Galveston Wharf Company before receipt therefore was delivered by the Wharf Company to the Steamship Company.

The purpose of receipts was that the Mallory Line might have permanent record thereof for future use, and a receipt when so given, and while signed by the Galveston Wharf Company, was really for account of the railroad transporting the particular freight out of Galveston.

No receipt for the shipment of sardines in question was delivered to the Mallory Steamship Company by the Galveston Wharf Company.

XII. That had said shipment of sardines been moved promptly out of Galveston, same would have reached El Paso about the 18th day of January, 1926, and the market

value thereof at El Paso, on January 18, 1926, was $5,376.25, and that said shipment, while consigned to the American Grocery Company at El Paso, Texas, was really purchased and would have been delivered in El Paso in agreed proportions to American Grocery Company, Charles L. Pomeroy Company, the H. Lesinsky Company, F. S. Ainsa Company, Joseph Renin, doing business under the name of Western Grocery Company, Adolph Nasits, doing business as Nasits Sales Company, Max Franklin and Harry Goodman, doing business under the name of Franklin & Goodman, and C. H. Lawrence. That said plaintiffs, and none of them, ever received any of said goods, nor have they, or either of them, ever been paid the value thereof.

Conclusions of Law

I. I conclude that, not only as a fact, but as a matter of law, the Mallory Steamship Company had made due de-[fol. 35] livery of the shipment in question by the placement thereof on the wharf of the Galveston Wharf Company, at the point designated for the receipt thereof, and that at the time of the destruction of said shipment by fire same was in the possession of the Galveston Wharf Company as a common carrier. That said shipment had been by the Mallory Steamship Company delivered as a common carrier on the date of the arrival of the steamship Concho at Galveston, and that said shipment had been on that date received by the Galveston Wharf Company as a common carrier.

II. I conclude that the Mallory Steamship Company so delivered said shipment in due course of transit, and that the handling of said shipment by the Galveston Wharf Company was an integral part of the transportation between the point of origin and the final destination thereof, and that the Galveston Wharf Company intended to deliver said shipment to the Galveston, Harrisburg & San Antonio Railway Company for transit to final destination, but that delivery thereof by said Wharf Company to said Railway Company had not been made at the time of the destruction and loss of said shipment by fire.

III. I conclude that Article VI of the contract between the Galveston Wharf Company and the Mallory Steamship

Company, and which is set out under my fourth Finding of Fact, was not a contract of indemnity to the Wharf Company by the Mallory Steamship Company, and that thereunder the Mallory Steamship Company did not assume responsibility for the loss of goods which were at the time of such loss actually in the possession of the Wharf Company.

If, however, Article VI above referred to, may be construed as such indemnity to the Wharf Company by the Mallory Steamship Company, then, that as such it is void and contrary to public policy in that it is a contract under which the Wharf Company would be exonerated for its own negligence, or for loss for which it would be otherwise re- [fol. 36] sponsible as a common carrier, and that there was no lawful authority for the Mallory Steamship Company, a transportation company subject to the Acts of Congress, to become the guarantor or surety of another transportation company in the performance of a duty owed by the latter to a shipper, and that said paragraph of the contract above refered to gave to the Wharf Company no right of recovery against the Steamship Company for a loss occurring to goods while same were in the possession of the Wharf Company.

IV. I conclude that the Galveston Wharf Company is liable to the plaintiff for the loss sustained, which I have found to be the sum of Five Thousand Three Hundred Seventy-six and 25/100 Dollars ($5,376.25) with interest thereon at the rate of six per cent (6%) per annum from January 18, 1926, and that said Wharf Company is not entitled to recover over and against the Mallory Steamship Company for any part or portion of said loss.

V. I conclude that, as the shipment in question was not in the possession of either the Mallory Steamship Company or the Galveston, Harrisburg & San Antonio Railway Company at the time of the loss thereof, that plaintiff is not entitled to judgment against them or either of them for the loss, this being exclusively an inter-state shipment, and the carriers each and all being subject to the provisions of the Inter-state Commerce Act.

(Signed) W. D. Howe, Judge 34th Judicial District of Texas, Presiding.

[File endorsement omitted.]

[fol. 37] IN DISTRICT COURT OF EL PASO COUNTY

[Title omitted]

ASSIGNMENTS OF ERROR—Filed October 22, 1927

The Galveston Wharf Company, one of the defendants in the above entitled and numbered cause, files the following assignments of error:

First Assignment of Error

The court erred in rendering judgment in favor of the plaintiff against this defendant, for the reason that under the undisputed evidence the shipment in question was not in the possession of the Galveston Wharf Company as a common carrier, and there was no proof of any negligence of the defendant Galveston Wharf Company that would make it responsible to the plaintiff.

Second Assignment of Error

The Court erred in rendering judgment against the Galveston Wharf Company in favor of the plaintiff, for the reason that the undisputed evidence shows that the Galveston Wharf Company was not a party to the contract of the carriers sued upon by the plaintiff, and the shipment described in plaintiff's petition at the time of the loss and damage by fire was not in the possession of Galveston Wharf Company, but in the possession of the Mallory Steamship Company.

Third Assignment of Error

The Court erred in overruling motion of the defendant Galveston Wharf Company for judgment upon plaintiff's demand, for the reason that the undisputed evidence shows that at the time of said loss and damage by fire alleged in plaintiff's petition, the shipment in question was not in the possession of Galveston Wharf Company as a common carrier.

[fol. 38] Fourth Assignment of Error

The Court erred in overruling defendant's motion for jud-ment on plaintiff's demand, for the reason that, under the overwhelming preponderance of evidence, at the time

of the loss and damage to plaintiff's property by fire as alleged in plaintiff's petition, said property was not in the possession of Galveston Wharf Company as a common carrier, and there was no evidence of negligence on the part of Galveston Wharf Company.

Fifth Assignment of Error

The court erred in overruling defendant's motion for judgment over against the Mallory Steamship Company, for the reason that under the undisputed evidence there was a contract between the Galveston Wharf Company and the Mallory Steamship Company under which the Galveston Wharf Company was not to be responsible for loss or damage to plaintiff's property while on or passing over the piers leased by the Galveston Wharf Company to the Mallory Steamship Company.

Sixth Assignment of Error

The Court erred in overruling motion of Galveston Wharf Company for judgment over against Mallory Steamship Company, for the reason that under the undisputed evidence there was a contract between the Galveston Wharf Company and the Mallory Steamship Company under which the Galveston Wharf Company was not to be responsible for loss or damage to any shipment on the piers leased by the Galveston Wharf Company to the Mallory Steamship Company or being handled over said piers.

Seventh Assignment of Error

The Court erred in overruling motion of defendant Galveston Wharf Company for a judgment in favor of the plaintiff against the Galveston Wharf Company and the Mallory Steamship Company, with a provision that the [fol. 39] judgment should be satisfied, first, out of the property of the Mallory Steamship Company, and, second, out of the property of the Galveston Wharf Company, for the reason that under the undisputed evidence it was agreed between the Galveston Wharf Company and the Mallory Steamship Company that the Galveston Wharf Company should not be responsible for any loss or damage to goods or cargoes on piers leased by the Galveston Wharf Com-

pany to the Mallory Steamship Company or passing over the same, and that under such agreement the Mallory Steamship Company was responsible for loss and damage to plaintiff's shipment.

Eighth Assignment of Error

The Court erred in overruling motion of Defendant Galveston Wharf Company for a judgment in favor of the plaintiff against the Galveston Wharf Company and the Mallory Steamship Company with a provision that the judgment should be satisfied first, out of the property of the Mallory Steamship Company, and, second, out of the property of the Galveston Wharf Company, for the reason that under the evidence there was an understanding between the Galveston Wharf Company and the Mallory Steamship Company that the Galveston Wharf Company should not be responsible for the loss and damage involved in this case, but that the Mallory Steamship Company should be responsible for the same.

Ninth Assignment of Error

The Court erred in Paragraph III of its findings of fact to the effect that the shipment of sardines had been unloaded by the Mallory Steamship Company and had been by said company put at the designated place on the wharf, for the reason that such finding of fact is not supported by the evidence.

Tenth Assignment of Error

The Court erred in Paragraph V of its findings of fact to the effect that the Galveston Wharf Company is a chartered transportation company, for the reason that such finding of fact is not supported by the evidence.

[fol. 40] Eleventh Assignment of Error

The Court erred in Paragraph V of its findings of fact to the effect that the Galveston Wharf Company makes the regular reports to the Interstate Commerce Commission that are ordinarily made and required of all common carriers by railroad, for the reason that such finding of fact is not supported by the evidence.

Twelfth Assignment of Error

The Court erred in Paragraph VI of its findings of fact to the effect that said billing was immediately and two days prior to the arrival of the vessel delivered to the defendant Galveston Wharf Company for information and instructions as to the handling of each and all of the shipments in said vessel after the same had been placed on the wharf by the Steamship Company, for the reason that such finding of fact is not supported by the evidence.

Thirteenth Assignment of Error

The Court erred in Paragraph VII of its findings of fact to the effect that as each particular shipment was unloaded from the "Concho" by the Mallory Steamship Company, it was placed or spotted in that territory on the wharf which had been usually and customarily set aside for that purpose; that is to say, the carload freight destined for transit out of Galveston over the Galveston, Harrisburg & San Antonio Railway Company was usually and customarily placed by the Mallory Steamship Company in that territory on the wharf that had been generally designated by the Wharf Company for that purpose, and that the carload of sardines in question was by the Mallory Steamship Company duly placed in the territory so set aside for the reception and delivery of such freights, for the reason that said finding of fact is not supported by the evidence. There is no evidence that said place where said sardines were placed was designated by the Galveston Wharf Company.

[fol. 41] Fourteenth Assignment of Error

The Court erred in Paragraph VII of its findings of fact to the effect that "all the work to be done relative to said shipment by the Mallory Steamship Company had been fully completed and performed by 4:00 o'clock on the afternoon of January 13, 1926, and that thereafter, and having so made such placement, the Mallory Steamship Company had nothing whatever to do with the further handling or movement of said shipment", for the reason that said finding is not supported by the evidence, in that the evidence

shows that under the course of dealing it was the duty of the Mallory Steamship Company to check with the Galveston Wharf Company said carload of sardines at the time the Galveston Wharf Company would pick up and load it into the cars.

Fifteenth Assignment of Error

The Court erred in Paragraph X of its findings of fact to the effect that the shipment of sardines was left by the Galveston Wharf Company on the wharf at the point where it had been placed by the Mallory Steamship Company, for the reason that such finding is not supported by the evidence, in that said Galveston Wharf Company had not taken possession of said shipment or exercised and dominion or control over the same.

Sixteenth Assignment of Error

The Court erred in paragraph XI of its findings of fact to the effect that the delivery receipts for goods and shipments was not a prerequisite required by the Mallory Steamship Company before same could be moved from the wharf and the Steamship Company never required the Galveston Wharf Company to deliver a receipt before freights and shipments were removed from the wharf, and that the purpose of receipts was that the Mallory Line might have permanent record thereof for future use, for the reason that the undisputed evidence shows that while such receipts [fol. 42] might not be actually delivered by the Galveston Wharf Company to the Mallory Steamship Line until after the shipment was picked up on the wharf, said receipts were all given as of the time of the picking up of the shipment from the wharf by the Wharf Company, and that the object and purpose of said receipts was to show the amount of the shipments received by the Wharf Company and the time of the receipt of same from the Mallory Steamship Company.

Seventeenth Assignment of Error

The Court erred in Paragraph I of its conclusions of law to the effect that as a matter of fact, and as a matter of law, the Mallowy Steamship Company had made deliv-

ery of the shipment in question by the placement thereof on the wharf of the Galveston Wharf Company at the point designated for the receipt thereof, and that at the time of the destruction of said shipment by fire, same was in possession of the Galveston Wharf Company as a common carrier, that said shipment had been delivered by the Mallory Steamship Company as a common carrier on the date of the arrival of the Steamship "Concho", and that said shipment had been on that date received by the Galveston Wharf Company as a common carrier, for the reason that under the undisputed evidence said shipment had not been delivered to or received by the Galveston Wharf Company as a common carrier at the time said shipment was damaged by fire.

Eighteenth Assignment of Error

The Court erred in Paragraph II of its conclusions of law to the effect that the Mallory Steamship Company delivered said shipment in due course of transit, and that the handling of said shipment by the Galveston Wharf Company was an integral part of the transportation from the point of origin to the final destination thereof, for the reason that under the undisputed evidence the Galveston Wharf Company had no connection with the said shipment as a common carrier. It was employed by the G. H. & S. [fol. 43] A. Railway Company to pick said shipment up from the wharf and place it in the cars of said company, that under such employment it had not taken possession of said shipment or exercised any dominion or control over same.

Nineteenth Assignment of Error

The Court erred in Paragraph III of its conclusions of law to the effect that Article VI of the contract between the Galveston Wharf Company and the Mallory Steamship Company was not a contract of indemnity to the Wharf Company by the Mallory Steamship Company, and that under said contract the Mallory Steamship Company did not assume responsibility for the loss of the goods, which were at the time of said loss actually in possession of the Wharf Company, for the reason that said contract was in effect a contract of indemnity and under the same the Mal-

lory Steamship Company was liable for the damage to said shipment.

Twentieth Assignment of Error

The Court erred in Paragraph III of its conclusions of law to the effect that at the time of said damage to said shipment, said shipment was actually in possession of the Galveston Wharf Company, for the reason that there was no evidence that at the time of said loss and damage said shipment was actually in possession of said Galveston Wharf Company.

Twenty-first Assignment of Error

The Court erred in Paragraph III of its conclusions of law to the effect that if Article VI of the contract between the Wharf Company and the Mallory Steamship Company should be construed as an indemnity contract, such contract is void and contrary to public policy, and that it is a contract under which the Wharf Company would be exonerated for its own negligence, or for a loss for which it would be otherwise responsible as a common carrier, in that there was no lawful authority from the Mallory Steamship Company, a transportation company subject to [fol. 44] the acts of commerce, to become the guarantor or surety of another transportation company in the performance of the duty owed by the latter to a shipper, for the reason that there was no evidence of a loss due to the negligence of the Wharf Company, because there is nothing in law that prohibits or forbids such contract.

Twenty-second Assignment of Error

The Court erred in rendering judgment against the defendant, Galveston Wharf Company, and in holding, as a matter of law, that the Mallory Steamship Company had made delivery of the shipment in question to the Galveston Wharf Company, and that the Galveston Wharf Company was liable as a common carrier for the loss and damage by fire to the property described in plaintiff's petition, for the reason that the law of the United States of America controls a shipment under the bill of lading sued upon, and that by virtue of said law, there was no liability on the

part of the Galveston Wharf Company as a common carrier.

Wherefore, for each of the errors assigned, the defendant, Galveston Wharf Company, prays the Court to reverse judgment of the trial court and render judgment herein for the Galveston Wharf Company; or, if it be not entitled to such relief, that the judgment of the trial court be reversed and that this cause be remanded for a new trial; and for relief, general and special.

Thompson, Knight, Baker & Harris, Geo. S. Wright, Attorneys for Defendant Galveston Wharf Company.

[File endorsement omitted.]

[fol. 45] In District Court of El Paso County

[Title omitted]

Plaintiffs' Assignments of Error—Filed October 24, 1927

American Grocery Company, a corporation, Charles L. Pomeroy Company, a corporation, The H. Lesinsky Company, a corporation, F. S. Ainsa Company, Inc., a corporation, Joseph Rehin, doing business under the name and style of Western Grocery Company, Adolph Nasits, doing business as Nasits Sales Company, Max Franklin and Harry Goodman, doing business as Franklin & Goodman, and C. H. Lawrence, plaintiffs in the above entitled and numbered cause, assign the following as errors committed by the Court in the trial of said cause from, to-wit, the 2nd day of May A. D. 1927 to the 3rd day of May, A. D. 1927.

1st. The trial court erred in rendering judgment in favor of the defendant, Mallory Steamship Company, on plaintiffs' cause of action, for the reason that the undisputed evidence showed the shipment in question was in the joint possession of the Mallory Steamship Company and Galveston Wharf Company, common carriers, at the time of the loss and damage by fire to such shipment, and that the Mallory Steamship Company was liable to the plaintics for such loss and damage by fire.

2nd. The trial court erred in rendering judgment in favor of the Mallory Steamship Company, on plaintiffs' cause of action, for the reason that under the undisputed evidence and the laws and decisions of the United States of America, at the time of said loss and damage by fire said shipment was in the joint possession of the Mallory Steamship Company and the Galveston Wharf Company as com- [fol. 46] mon carriers, and the said Mallory Steamship Company was liable to the plaintiffs for such loss and damage, and the question of such liability is a federal question to be determined under the statute and decisions of the United States of America.

3rd. The trial court erred in rendering judgment in favor of the Galveston, Harrisburg & San Antonio Railway Company on plaintiffs' cause of action, for the reason that under the undisputed evidence, such shipment, at the time of the loss and damage by fire, was in the joint possession of the Galveston, Harrisburg & San Antonio Railway Company and the Galveston Wharf Company as common carriers, and said Galveston, Harrisburg & San Antonio Railway Company was liable to plaintiffs for such loss and damage by fire.

4th. The trial court erred in rendering judgment in favor of the Galveston, Harrisburg & San Antonio Railway Company on plaintiffs' cause of action, for the reason that under the undisputed evidence, at the time of such loss and damage by fire such shipment was in the joint possession of the Galveston, Harrisburg & San Antonio Railway Company and the Galveston Wharf Company as common carriers, and the said Galveston, Harrisburg & San Antonio Railway Company was liable to the plaintiffs for such loss and damage, and the question of such liability presents a federal question to be determined under such statutes and laws of the United States of America.

Wherefore the plaintiffs herein pray the Court to affirm the judgment of the trial court, and if they be not entitled to such affirmance that the Court render judgment herein against the Galveston, Harrisburg & San Antonio Railway Company and the Mallory Steamship Company, or either

or both of all defendants, and for costs of suit, and for [fol. 47] relief, general and special.

(Signed) Fryer & Cunningham, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 48] In District Court of El Paso County, Texas, 65th Judicial District, May Term, 1927

No. 27467

American Grocery Company et al.

v.

G., H. & S. A. Railway Company et al.

Statement of Facts—Filed Jan. 5, 1928

Be it remembered that upon the trial of the above entitled and numbered cause the following were the facts and all of the material facts proven, to-wit:

Herbert Goodman, witness for plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Fryer:

My name is Herbert Goodman. I am connected with the American Grocery Company, and am familiar with the shipment on or about December 23, 1925, of some sardines from Eastport, Maine, by the Mallory Line from New York to Galveston, which is the subject of this suit. The bill of lading No. 50030, Shipper's No. R-6016, is the original bill of lading.

(Plaintiff here introduced in evidence the original bill of lading marked Exhibit 1, hereto attached and made a part hereof).

We never received these goods, nor did anyone for me or my company ever receive them. I have been in the business of buying and selling groceries and sardines for about

twenty years. A shipment leaving New York on or about January 1st by the Mallory Line to Galveston, and by the G. H. & S. A. Ry. Company to El Paso, in the ordinary course of transportation, would arrive in El Paso at about between fifteen or eighteen days. I know the reasonable and fair market value of the sardines shipped in this ship-[fol. 49] ment at El Paso on or about January 18, 1926. Such reasonable and fair market value was about $5.25 a case; that is the basis. By basis I mean there are different kinds of sardines, some with keys and some without. What we call basis is keyless. This shipment consisted of 1095 cases of Banquet Keyless ¼ Oil Sardines. The value would be $5.25 a case at El Paso, Texas, on that date. There were twenty cases of Banquet Keyless ¼ Oil Sardines that would be 50¢ a case higher, and that would be the reasonable market value of those goods, that is, $5.75 a case at El Paso at that time. That includes freight. The freight was not paid. The freight would be 48¢ per case. That would make the sardines $4.77 for the keyless and $5.27 for the key, the freight not having been paid. Of course the tariff shows what the freight is.

(It was here agreed by all parties that the time this shipment should arrive in due course was about January 18th).

This shipment was routed from New York by the Mallory Line, and by the G. H. & S. A. Railroad to El Paso.

Cross-examination.

By Mr. Wright:

We bought this shipment at Eastport, or F. O. B. New York. The shipper usually insures the shipment. The shipper was the Maine Cooperative Sardine Company. I do not know whether they insured these goods in transit for our benefit or not. They usually insure them.

Redirect examination.

By Mr. Fryer:

This was a pool car; that is, a certain amount was for C. H. Lawrence, a certain amount for Western Grocery Company, a certain amount for Franklin & Goodman, a

certain amount for Chas. L. Pomeroy & Company, a certain amount for M. Lesinsky Company, a certain amount for American Grocery Company, a certain amount for [fol. 50] F. S. Ainsa Company, and a certain amount for Nasits Sales Company. These are certified copies of the order as placed with the Maine Cooperative Sardine Company, of Eastport, Maine, and they show the individual items.

(Plaintiff here introduced in evidence Exhibits 2, 3, 4, 5, 6, 7, 8, and 9 respectively, hereto attached and made a part hereof. It was here agreed by all parties that the shipment which is the subject of this suit was destroyed by fire at Galveston on the wharf on the night of January 13, 1926, and was never delivered.)

Recross-examination.

By Mr. Kemp:

I do not know whether these goods were insured by the shipper. They were supposed to insure them. I had no word that they had been insured. We never received any money from any insurance people for them. The shipper never refunded me any money. We paid the shipper for the goods.

Plaintiffs rest.

F. E. Bertram, called as a witness in behalf of the Mallory Steamship Company, being duly sworn, testified as follows:

By Mr. Culwell:

My name is F. E. Bertram. I live at Galveston. I am Dock Superintendent for the Mallory Steamship Company. I have held this position about sixteen years. I have been with the Mallory Line about twenty years. The first position I had with the Mallory Line was bill of lading clerk. My next position was cashier and accountant; the next, chief clerk, and then dock superintendent. I am familiar with the methods of handling the business of the Mallory

Line, as well as with the controversy we have here today. The Steamer "Concho" carried this shipment of sardines from the port of New York to the port of Galveston. It [fol. 51] originated at Eastport. That, I believe, as they say, is the transfer from the New York Central to the Mallory Line.

(Defendant Mallory Line then offered in evidence this transfer marked Exhibit "A" and made a part hereof.).

This was voyage 112. My connection with it started when it got to Galveston. The ship was docked at Galveston at 8:15 a. m. January 13, 1926. It berthed at the Galveston Wharf Company's Piers Nos. 24 and 25. As soon as a ship berths and is secured, it is tied fast to the dock, and we immediately commence to open ports and hatches and rate the ship, and commence discharging. We commence discharging as soon as the rating is completed. The Mallory Line does the discharging from the ship to the wharf. On the morning of the 13th we were working approximately 250 men in the discharge of this vessel. I recall that this shipment was located on the vessel on the lower forward bottom-decks in the peak against the forward bulkhead. As soon as the vessel leaves New York the Mallory line forwards the billing and storage plan of the shipment by mail from its New York office to Galveston, on ship sailing Wednesday from New York, and this would reach Galveston Saturday or early Sunday morning. When we get this billing and storage plan in Galveston, the billing is entered into check-books by the check clerks of the Mallory Line, and then turned over immediately to the check clerk of the Galveston Wharf Company. This is all accomplished at least two days before the vessel gets to Galveston. This was done relative to this voyage. Two days before the "Concho" arrived in Galveston we had furnished the Galveston Wharf Company with the billing and tonnage of the storage plan, so that at the time the ship arrived the Galveston Wharf Company knew the contents of the vessel. The other information contained in the billing on car-load lots shows the storage, indicating [fol. 52] the part of the ship where the shipments are stowed. This shipment was a car-load shipment, what is called a package car. The billing contains the routing and

ultimate destination of the shipment. The information we furnished to the Wharf Company, which they had before the vessel reached Galveston, gave them full information relative to this particular shipment, its location on the vessel, its ultimate destination, S. P. to El Paso. We actually began unloading this ship about 8:30 a. m. January 13, 1926. We had completely unloaded the vessel that day at about 5:30 p. m., January 13, 1926. It is my recollection that this car of canned goods, of sardines, had been placed upon the wharf sometime between 2:00 and 3:00 o'clock in the afternoon. It is my impression that this shipment had been unloaded and placed on the wharf prior to 3:00 o'clock in the afternoon. As to who designates the place on carload shipments, it is understood and agreed that they be discharged opposite the part of the ship where they are stowed. A shipment stowed in the forward end of the ship is discharged opposite the forward end, and shipments in the aft end are discharged opposite the aft end. There is a division line, and we do not go forward of that division line with the forward end and aft end with freight. This shipment was in the forward end, and it was discharged in that territory that was adjacent to the forward end of the vessel. It was discharged adjacent to the railroad tracks. The Galveston Wharf Company has tracks onto the wharves. The tracks of the Galveston Wharf Company that lead from the wharf at the ship's side connect with the railroads out of Galveston. There is a connection track between the track of the Galveston Wharf Company leading to Piers Nos. 24 and 25 that immediately connect with the G. H. & S. A. Railway Company. This shipment was destined to leave Galveston over the G. H. & S. A. Railroad. Cars were placed for the loading of this shipment the night before the arrival of the vessel on Tracks 1, 2, 3, 4, 5, and 6, is my recollection, and possibly [fol. 53] 7, and these tracks are adjacent to the place where the freight of the forward end of the boat is unloaded. It is about 70 or 80 feet, probably, from the point on the wharf where we place the goods to the adjacent railroad tracks. When the goods are discharged on the wharf by the Mallory Line, the Galveston Wharf Company handles it from that point. The Mallory Line does not have anything to do with the loading of the cars. The Galveston

Wharf Company loads these cars. It has a bunch of men there for that purpose, and did on this occasion. The Galveston Wharf Company was actually loading cars there that day. There were 1081 tons in that boat. There were 206 tons of L. C. L. and 780 tons of car load. The Galveston Wharf Company did not finish the loading of this shipment on that date. They quit in the afternoon, according to my recollection, about 6:30 p. m. January 13th. The fire occurred that night. They loaded out on that day 206 tons of L. C. L. freight, and car-load freight amounting to 401 tons, I believe. That left there for loading next day, or whatever time they chose, 379 tons. I have had a great deal of experience loading freight from ship-side to cars. The Morgan Line also operates into Galveston. It was possible for the Galveston Wharf Company to unload all the freight we unloaded for them that day. They did not work continuously that day in unloading L. C. L. freight. They were interrupted. They took the crew off that day to unload cars at the loading pier, so they were not at work continuously loading the shipment out that day. Had they kept the work up regularly, it could all have been loaded on the cars that day. Our force unloaded the vessel and put the shipments at convenience places on the wharves as designated. Assuming that there are no broken packages, we do no further handling of a shipment. The Galveston Wharf Company does. Relative to the time when we have placed our shipment at the designated places on the wharves, so far as the Mallory Line is concerned, the Wharf Company may load it out immediately. This ship-
[fol. 54] ment moved on through bill of lading from point of origin to El Paso. The billing was already in the hands of the Wharf Company. It knew the ultimate destination. We have nothing to do with the placing of the cars nor with the ordering of the cars in, but the Galveston Wharf Company does.

In unloading vessels our men check the shipment as to identification marks, location on the ship, and its place on the dock. We generally get a receipt from the connecting line approximately two days, not sooner, after we have finished our physical handling of the shipment. We do not require the Galveston Wharf Company, or the connecting railroad, to give us a receipt before we permit them to move

the shipment from the point where we put it on the wharf. They just take it. The car is not held until we get our receipt. In other words, they go ahead in handling without reference to giving a receipt, and when they get to that order of business, they send us down a receipt. We do not demand any receipt before we let them have the freight. Relative to this car of sardines, we would have permitted the Galveston Wharf Company or the G. H. & S. A. Railway Company to remove the shipment from the point where we had placed it on the wharf without a receipt. In the usual and customary handling of freight over the wharf from the vessel, after we have placed a shipment at the designated point on the wharf, the only thing else, if anything, the Mallory Line has to do with the shipment is to repair the bad order packages. Assuming there are no bad order packages, we have nothing further to do with it. There were some bad order packages in this shipment of fish. I would not say the number of cases, but there were a few cases that were broken and required fixing.

As I said, we got through unloading the vessel at 5:30 p. m. At that time the cars were in there on the tracks for loading out freight. I understand there were 70 cars. The trackage there would accommodate approximately 100 cars [fol. 55] probably more. There were enough cars there to take care of all the freight on this boat. I do not know how many were left over that night. The fire occurred sometime between 11:00 and 12:00 o'clock p. m.

The Galveston Wharf Company uses their wharves for other purposes besides handling shipments from the Mallory Line. It is the rule for the Wharf Company not to work at night in loading cars, unless all shipments can be loaded before 9:00 o'clock that night. These shipments could have been loaded before 9:00 o'clock that night. They quit working about 6:30 p. m. and had not been working continuously during the day. I understand they had been working about twelve gangs of about twelve men to the gang, or about 144 or 150 men. There were other shipments in that boat destined for El Paso. There was a car-load of coffee and a car-load of wire. They were unloaded by the Mallory Line and put on the wharf in approximately the same location as the sardines. They were taken out that day by the Wharf Company and the railroad. They did not give any receipt for it before they moved it. They

did not ask our permission whether they could move it or not. When we set it down there, they picked it up and took it on. This third car they did not take up. We got no receipt after the other two cars destined for El Paso moved out, unless they were signed in the meantime. I am not familiar with that. I do not know what character of receipt was issued. I don't know of my own knowledge, but I did not get any receipt.

Cross-examination.

By Mr. Kemp:

I was formerly chief clerk, and am now dock superintendent. Much of the testimony I have given about the plans and methods of the company and about the handling is based upon my observation. I was there practically all day off and on. I think the uniform practice is for the rail- [fol. 56] road company to always issue receipts. That is still the practice and has been for many years. Now, these receipts do not go to me, but go to the office. They have never receipted for cars on the first day. I don't know whether the receipts were issued or not. I know they do issue receipts. I know that receipts were issued for those cargoes. If receipts were not issued for those cargoes, that would be reported, and no report was made to me. If the railroad company failed to give a receipt for the contents of the car, it would be in violation of the rules. I refer to the dock as the Galveston Wharf Company. It is the owner of the dock, the corporation that owns it. In ordinary maritime or terminal talk at Galveston the dock is referred to as the Mallory Line dock. That dock, at the discretion of the Wharf Company, may be used by other ship companies, but the Mallory Line has preference. It is the Mallory Line's business and official dock at Galveston. It is there their boats tie up and cargoes are discharged, under a lease agreement between the dock company and the Mallory Line. When the cargo is placed on the wharf, it is inspected by a Mallory Line inspector and a railroad inspector. We have our own cooperage plant there, and if packages are broken, or the containers need recoopering, the Mallory Line does that at its own cost and expense. According to my observation, this part of the cargo was unloaded before 3:00 o'clock in the afternoon. As to whether

I am quite sure about that, that is according to my recollection. This shipment was not the last shipment discharged from the ship, but it was one of the last. It was inspected and found that a few of the packages needed recoopering. Those packages would have remained there on the wharf until they were recoopered. They were recoopered before they burned. They were recoopered very shortly after they were discharged. I was not personally present, and did not see the recoopering. I only recall that the coopers had [fol. 57] finished the work. I do not know of my own knowledge whether they had completed that work or not. I took the position, in answer to Mr. Culwell's question, that we had no further control or management of this freight after it was put on the wharf. That is still my position. This is not true while we are recoopering. I stated to Mr. Culwell that our control of it ceased.

This shipment moved over through bill of lading from somewhere in the east to El Paso, Texas. If we had been confronted with a diversion or reconsignment of that shipment of sardines to some dealer in Greenville, Texas, if the American Grocery Company had filed a diversion or reconsignment, we would have endeavored to have a diversion. We would have reconsigned it for the accommodation of the consignee. After the goods had actually been loaded in the freight cars, and we had received the diversion or reconsignment order, the shipment would have been beyond our control.

I say that a carload of wire and coffee moved out in the morning, consigned to El Paso. The coffee and wire were not taken out of the boat somewhere around 9:00 o'clock in the morning. They were stowed very close to the sardines. They got out sometime in the afternoon. I am testifying to my recollection. I have said there were some 70 cars there. These cars were the cars of many railroads. The Wharf Company tracks are there, and the railroad cars go in on the Wharf Company's tracks. The Missouri, Kansas & Texas cars go there, and the International & Great Northern cars, and the Gulf Colorado & Santa Fe cars, and the Galveston, Harrisburg & San Antonio cars.

The L. C. L. tonnage was 206 tons, full car tonnage 780 tons, something like that. We had loaded out L. C. L., 206 tons and 401 tons of car-load freight up to 6:30 p. m.,

something like 607 tons. There were 90 some odd local. That would leave 370 tons. As to whether that was 50% [fol. 58] of what it had taken eight or nine hours to unload, my part was discharging the ship, unloading from the ship. I testified that they could have loaded that night. I think they could have, if they had quit at 9:00, and, according to the records, they had loaded only 50% at that time. As to whether that would give them approximately 2½ or 3 hours to load 300 tons, with continuous work, they should have loaded it. The Galveston Wharf Company had twelve gangs of twelve men each.

I have examined the document you handed me, and it is a fairly accurate drawing of the wharf. This illustrates the position of the ship at the dock, and these clearly show the railroad lines. It designates somewhere about where the sardines were located. The other map properly indicates where the rolls of wire and cases of fish were: "1125-CS-CD-Fish"; that is, where they were unloaded. Here are the M. K. & T. less than car-load lots. Here are the I. & G. N. less than car-load lots. Here are the G. C. & S. F. less than car-load lots. Here is the platform. Here come the other railroads. There does not seem to be any G. H. & S. A. railroad indicated there. It ought to be one of those at the bottom. Here it is, S. P. You say that means freight territory, and that there are no rail lines for the G. H. & S. A. It is right here, 5, 6, and 7.

(Defendant railroad company then offered in evidence the map marked Exhibit "B" and made a part hereof.)

Cross-examination.

By Mr. Wright:

I do not know that there were 45 cars of miscellaneous freight and 16 straight car-loads, a total of 65 cars loaded out that day. I do not know how many L. C. L. were loaded, but there were more than 16 straight car-loads. There were unloaded from the ship that day 39 solid car-loads. As to whether, in the ordinary course of business [fol. 59] on the car-load lots, the Galveston Wharf Company picked them up and put them on the cars and that were checked by representatives of the Galveston Wharf Company and representatives of the Mallory Steamship Company, I answer they were checked by representatives

of the Galveston Wharf Company and not by the Mallory Line on that date. It is a fact that when the Galveston Wharf Company picked up car-load shipments to be taken by it and loaded on the cars of the railroad, the Wharf Company would give a receipt to the Mallory Line as of the date and the time they picked the freight up off the wharf on Pier No. 24 to take over to the cars. It is a fact that on this particular day this "Concho" ship unloaded, a large number of cars had been loaded by the Galveston Wharf Company. In every one of those instances they picked up the freight from where the Mallory Line had deposited it on its Pier No. 24 and took it to the cars, and we later got a receipt for each of those cars that were loaded from the Galveston Wharf Company as of that time.

Redirect examination.

By Mr. Culwell:

Relative to the question asked me by Mr. Kemp about diversion and what we would do, the fact is that the billing controls. It is also true that before we would make a diversion, we would have to go to the railroad to get the billing. The billing has already been delivered to the railroad, and that is what controls. After a steamer leaves New York and is out on the high seas, and we have sent this billing by U. S. mail, after we get it to Galveston, we deliver it to the Galveston Wharf Company. While the shipment is enroute, we get a diversion order. We have to get into possession of the way bill before diversion can be made. After we have delivered the way bill to the Wharf Company, it in turn delivers it to the railroad covering the freights that are to go out on that line. If we get a [fol. 60] diversion order, we take it up with the Wharf Company. If they have not got the billing, we take it up with the railroad. It depends on whether or not the Wharf Company has functioned in the meantime.

In reference to the recoopering of these packages, it is true that in car-load shipments the recoopering is done right on the spot. The recoopering on these particular packages had been accomplished by 5:30 p. m. It had been completed, according to my best recollection, somewhere

before 4:00 o'clock. At 5:30 o'clock, when we ceased to work, so far as outward appearances of the packages was concerned, all of this shipment was in condition to go forward.

In answer to Mr. Wright's question awhile ago, I stated that we always get a receipt from the Wharf Company. It is a fact that sometimes we are delayed and have to take the matter up through Mr. Rennie's office to get the receipts. We have been delayed in some instances as long as a week or ten days in getting the receipts. We do not depand on getting the receipts before letting the shipment go out of Galveston. We never hold the shipment up because we have no receipt. We never get a receipt before we let them put it in the car. The purpose of the receipt is to check against overs and shorts at destination. So, as a matter of custom which has prevailed at that place for many years, we have never dreamed it essential to get a receipt from the Wharf Company before we let them have possession of the goods. The Mallory Line has no control whatever over the employees of the Wharf Company who handle these shipments from the place on the dock to the car. We give them no directions. We never undertake to do so. In order to get it clear there are 39 solid cars of through freight on the boat. We had 206 tons of less than car-load freight. I do not remember what is the average loading of less than car-load freight. I do not recall how [fol. 61] many cars of L. C. L. were actually loaded out that day by the Wharf Company. In unloading a ship, we unload car-load and L. C. L. at the same time and put it at the proper place on the wharf. The first day we endeavor to deliver the L. C. L. freight, but at the same time we are discharging car-load freight. Sheet iron was the last thing unloaded from the boat that day. This ship had a light load, something over 1,000 tons. An average load for that boat would be about 1,500 tons. We had a light tonnage of less than car-load freight on this boat.

Recross-examination.

By Mr. Wright:

I think the Wharf Company gives the Mallory Line these receipts in the name of the railroad company, connecting carrier, by the Wharf Company. In other words

the Wharf Company gives the receipt in the name of the railroad. They sign on account of the railroad. If it is going over the G. H. & S. A. Railroad, they give it "G. H. & S. A. Railway Company, by Galveston Wharf Company". The employees of the Wharf Company do the receipting, I suppose, for the railroad. The Wharf Company does the receipting, but I am not clear as to whether they do it for the railroad or not. I have no receipts given to me for the cargo unloaded that day out of this ship. I have none of them here. I don't handle this myself. I know there was no receipt given by the G. H. & S. A. or the Galveston Wharf Company for any sardines. We did not hold it up because we did not have the receipt. We did not hold it up at all. While these sardines were on the wharf they were policed by employees of the Mallory Line in part. They were not policed by any railroad police.

[fol. 62] ALBERT J. SCHULTE, called as a witness on behalf of the Steamship Company, being duly sworn, testified as follows:

Direct examination.

By Mr. Culwell:

My name is Albert J. Schulte. I live in Galveston. Am in the employ of the Mallory Steamship Company and hold the position of Chief Dock Clerk. I remember the arrival of the Steamship "Concho" in Galveston on the morning of January 13th, 1926. I was there and had something to do with placing the freight on the dock. I was at work on that day. My duties are to see that the freight is placed on the dock and ready for delivery to the Wharf Company. I look after and see that the clerks are there to check the L. C. L. freight to the dock. I have other duties on the dock. When I say check L. C. L. freight to the dock, I mean we have check clerks who check the freight. The freight comes out of the ship and is taken to the designated territories, and we have check clerks near where they put the L. C. L. to check them to the pile.

I remember this shipment of sardines. It was unloaded from the boat that day and placed on the wharf. As you come out of the conveyor, it was placed south of the gang-

way about 60 feet from the conveyor, I would judge. As you come out of the ship, you go west, and it was placed south of the gang-way, where we generally place car-load shipments on the dock. We have an electric conveyor. As soon as the shipment comes off the boat, it gets on that and is automatically carried to the designated place. This shipment was so placed on that day. Trucks came off the conveyor and took it to the pile and unloaded it in a pile on the dock. I remember it was on dock in the early afternoon. I could not tell the exact time. I judge it was before 2:00 o'clock. This was a car-load shipment. After we [fol. 63] placed the shipment in the designated territory, that is all we have to do with it. If we have broken cases, we set them aside, and the Mallory Line coopers come along and put them into condition, and we are through with it, and it is ready for the Wharf Company to load out. The Wharf Company does the loading of the cars from the place we put it. We have no voice in saying when they shall do that. They do that at their own pleasure and convenience. Some of these packages were broken, not a large amount. They were put into condition that day. I would say that this particular car-load of sardines was ready to be put on the cars before 4:00 o'clock. After that time we had nothing to do with it. The Mallory Line was through with it. As to whether any of the representatives of the Wharf Company or railroad company had examined this shipment, I say they had. When the damaged cases were recoopered, they put the O. K. mark on them after we recoopered them. This was done by a representative of the railroad. The railroad has more than one clerk on the dock. The man representing the railroad company that O.K.'d these packages represented the railroad, but I could not tell you what man. I know he represented the railroad. As to how I know, Mr. Reed is the representative of the railroad, and his man was the man at the pile. Mr. Reed was there at this time. As to whether I saw Mr. Reed there, he was on the dock somewhere. I remember seeing him on the dock. All the railroads have a common representative there. Mr. Reed represents them as joint line inspector. Mr. Reed's men had OK'd this shipment and put their O.K. on it. The Mallory Line coopers do not recooper until Mr. Reed's man puts an O.K. on. They have a stamp, and then the Mallory Line recoopers or nails up the cases

and fixes up the cartons, whatever it is. A representative of the joint railroad interests stands around when the men are recoopering and sees that it is done, and then [fol. 64] stamps it. That was done in this case. They do not put an O.K. on anything but broken packages. The only movement of car-load freights that are in good condition is a placement on the wharf by the Mallory Line, and it is taken up by the Wharf Company and carried on. That is all there is to it. When there is reconditioning to be done, then it has to be O.K.'d by a joint representative of the railroads when we get through recoopering. That had been done in reference to these broken cases. Mr. Reed is a joint line inspector employed by the railroads and represents the railroads on the dock. He is there as the joint representative of the bay lines, I think. The G. H. & S. A. Railroad is one of the bay lines. There are three different sets of clerks work on the dock. The Mallory Line has a set of clerks, the Wharf Company has a set of clerks, and the railroad company has a set of clerks. There are two kinds of labor on the dock, the Wharf Company labor and the Mallory Line labor. So far as the clerks are concerned, it is divided into three classes. The labor is what moves the freight. The clerks check it. The Mallory Line places the shipment on the dock and the Wharf Company picks it up. This car-load of sardines was ready to go forward from the point where it had been placed by the Mallory Line by 4:00 o'clock in the afternoon. After that time the Mallory Line had their coopers on the dock. After this particular shipment had been reconditioned and was there in position, there was no other labor relative to it that was to be done by the Mallory Line.

Yes, I have something to do with the handling of the billing. It is sent from the postoffice to the city office, and then to the dock to me. I separate it, and we write our books. As we go along, the Wharf Company, as a rule, comes and gets the billing. The billing is turned over to them when we finish. As a rule, they generally follow us along. We have adjoining offices on the wharf. When we [fol. 65] get through handling this billing, which comes by mail from New York, we pass it on to the check clerks of the Wharf Company. This is done from one to two days before the arrival of the steamer. The Galveston Wharf Company and the G. H. & S. A. Railway Company, prior to

the arrival of this vessel in port, had notice that there was a car load of sardines, destination El Paso, Texas, because they had the billing on it. I got my information that the G. H. & S. A. Railway Company had notice of this, because we had turned the billing over to the Wharf Company's clerks, and they generally, as a rule, write the billing right after we turn it over to them, then when they finish, they send it out to the railroad. That is generally done the day before the arrival of the steamer. That is the practice. This has been done time and time again, and I am assuming that they followed the customary practice. There was no different method of handling the billing on this car than we usually did on others. It was all done the same way.

I had something to do with getting receipts from the Wharf Company for freights. When these receipts finally get to me, whenever that may be, they are executed by the Galveston Wharf Company. The receipts we get for the shipments come from the Wharf Company and are signed, "Galveston Wharf Company". We do not get these receipts before the freight is taken off. We permit them to load the freight into the car without taking a receipt. We do not hold the car in Galveston until we get the receipt. There was a time when it would be, maybe, a week after the arrival of the freight and placement on the dock by us before we got a receipt. Here lately they have been doing better, sometimes two or three days. We never get receipts for shipments prior to the loading into the cars, and we have never required that they give us receipts before they move the freight.

[fol. 66] Cross-examination.

By Mr. Kemp:

It is a fact that we did not have a receipt for the sardines showing that the G. H. & S. A. Railway Company had possession or received these sardines. None was ever issued.

By Mr. Wright:

It is a fact that when this billing comes before the boat arrives, and our check clerk gets it, we then turn it over to the check clerks of the Wharf Company. It is a fact that the Wharf Company's clerks enter a record of those shipments in that billing on the books, just like the Mallory

Line As to whether, after they do that on carload lots, whenever the Galveston Wharf Company gets ready to pick up a carload lot at Pier No. 24 and put it on a car, they take a copy of the billing, accompanied by a clerk of the Mallory, and check those car load lots as they pick them up and take them over to the car. We have down there what we call check cars, a carload shipment stored in the car for a count. They don't check all carload shipments as taken from the dock to the cars. They don't check all carload shipments as taken from the dock and loaded into the cars. As to what cars they do check, just a few minutes ago I said they have carload shipments they check that they cannot count after loaded into the cars. They also have carload shipments they can count after loaded, and they count these after they are loaded into cars. This depends upon if the packages can be stored in the car for a count. It is not a fact that if the Wharf Company had begun to move these sardines on this platform that evening, they would have checked those sardines. We do not check to know what we have delivered. As to whether we depend on the Wharf Company to check, we place them on the dock and consider that our delivery.

You asked me if I know that Pier No. 24 was leased under [fol. 67] written contract by the Mallory Steamship Company from the Galveston Wharf Company. I have nothing to do with that. I did not know that. I have never been advised that Pier No. 24 was leased under written contract at a yearly rental of $5,000.00 by the Mallory Steamship Company from the Galveston Wharf Company, and yet, I testified on this stand that when we put those goods on a pier my company pays $5,000.00 a year for, we consider we delivered to the Galveston Wharf Company; and I did not know before that my company was leasing that pier. We place it on the dock, and we consider that delivery.

In this particular shipment there were a lot of carloads out of the "Concho" loaded by the Wharf Company into cars on this particular day. Yes, we may have gotten receipts later for each of those cars. In the course of business we would have gotten receipts for them, and these receipts would have been dated as of the time the Galveston Wharf Company took those carloads off the wharf and took them to the cars. As to whether it makes any difference what date we get the receipts, if it shows the date we received it, the date that showed in the books we considered the date loaded out. The receipt would not show the time

the Galveston Wharf Company took the freight off the wharf and took it to the cars. It would show the date it loaded it out, and we never got a receipt from the Galveston Wharf Company showing that they received the goods any time before the loading date.

Recross-examination.

By Mr. Culwell:

They do not give a receipt for the goods before they get to Galveston. I do not know Mr. Kemp. Assuming, in the regular and ordinary handling of this business as it has been customarily conducted for many years between the Mallory Line and the Wharf Company and the railroads, if this shipment had been put in the cars and gone out of Galveston, we never would have received any receipts from [fol. 68] the railroad company. The only receipts we would get would be from the Wharf Company. I know the method of handling what is called package freight coming in off the boats.

Recross-examination.

By Mr. Kemp:

When and after the goods are loaded on the cars, we get a receipt, and we do not get a receipt until the goods are loaded on the cars. We did not get any receipt with reference to this shipment of sardines,

Defendant Mallory Steamship Company rests.

E. E. Gossreau, called as a witness for Galveston Wharf Company, being duly sworn, testified as follows:

By Mr. Wright:

My name is E. E. Gossreau. I live in Galveston, Texas. I am General Manager of the Galveston Wharf Company. I have held this position since 1922. Prior to 1922, I have worked in various capacities for the Galveston Wharf Company since 1917. Prior to that, in other terminal work in Texas since 1905.

On January 13, 1926, the "Concho" unloaded. At that time I was General Manager of the Galveston Wharf Company. I was familiar with the books and records, the loading and unloading, and other transactions of the Galveston Wharf Company at that time. These records were all under my supervision and were correctly kept. Generally speaking, for the past year, or last year, in fact, 1926, and up to this time this year we have handled probably fifty million bushels of grain through our elevators, and cotton receipts have been up to this time approximately 3,800,000 bales and exported approximately 2,700,000 bales, the biggest business Galveston has ever done. All that business is handled over these piers. Of course, these piers were de-
[fol. 69] stroyed by fire January 13, 1926. The business for that year was not as heavy as this year. The cotton shipments were good, but the grain movement was not as heavy. The Mallory Line originally built Pier No. 24. They had a fire some years ago and rebuilt the structures known as Piers 23-26 and possibly 27. They built these structures on the land of the Galveston Wharf Company. After they rebuilt these structures, including Pier No. 24, the Galveston Wharf Company made a purchase of those piers from the Mallory Line, and the Galveston Wharf Company leased Piers Nos. 23 and 24 and others to the Mallory Line by written contract. That is a copy of the original contract. I made excerpts from the original before I left and, unfortunately, it cannot be located. That is a true and correct copy of the original.

(Defendant Galveston Wharf Company here introduced in evidence the written contract marked Exhibit "C", attached hereto and made a part hereof.)

At the time this fire occurred on January 13, 1926, this contract was still in force and effect. The bills were being rendered to the Steamship Company up to that time in the usual amount. At the time of this fire the Galveston Wharf Company published and issued regularly tariffs. As to what service these tariffs covered, generally the tariff in effect at that time, namely, January 13, 1926, was our Local Tariff No. 18, I. C. C. No. 28. I. C. C. No. 28 means Interstate Commerce Commission, filed with that body according to their rules and regulations. The tariff contains charges for switching service, for loading and unloading

the freight to and from cars, which service is performed for account of the Galveston Bay Lines. It contains also wharfage charges covering freight passing over piers, which charge is assessed against the vessel or its owners. I have a copy of the tariff. Copies of the tariff which I hold in my hand were sent to the G. H. & S. A., the Gal- [fol. 70] veston Bay Lines and the Mallory Steamship Company. Copies of this tariff and its supplements were sent to all Galveston Bay Lines and the Mallory, as has been the practice for years, with prior issues. During the year 1926 the Galveston Bay Lines and the G. H. & S. A. Railway Company employed the Galveston Wharf Company to render services for the charges outlined in that tariff. I turned to the sheet in the tariff and find that charge the Galveston Wharf Company made to the Galveston Bay Lines for picking up freight from Dock No. 24 and loading it into cars. That is the charge assessed against the Galveston Bay Lines by the Galveston Wharf Company. My testimony with reference to this tariff and the charge assessed against the railroads under the tariff assumed that the freight was loaded into the cars and the cars had moved out. The tariff is Section 2, page 8, Local Tariff No. 18. It reads: "Loading and unloading charges on export, import and coast-wise traffic." It enumerates the charge for the different commodities under it. That charge, for instance, on all commodities not otherwise specified, upon hundred pounds, is 2½¢ under L. C. L. shipments. It goes on further showing various commodities, cotton for instance. As to shipments of fish, sardines, canned fish, I think they would come under the 2¼¢ rating, unless the canned goods rate might have been applied per hundred pounds of 2¢.

When the "Concho" came in on the 13th of January, the billing is received from the Mallory Line by the Galveston Wharf Company in advance of the arrival of the ship. The Mallory Line writes it up on their books. It is then turned over to our forces and written up in the check books, which check books are used for the purpose of checking the different lots of merchandise in carloads in the cars. The general practice in vogue, and it has been that way for years, is that the Mallory Line checked the L. C. L. shipments and also the carloads in part, what they can, as it is unloaded from the ship. Now that is put on the pier in certain piles, [fol. 71] and it is checked up from these various and sundry piles by the Wharf Company's forces and checked from

such piles by our check clerks, and with reference to the carloads, they are also checked when they are lifted from the piles by our check clerks. In some instances the check is made after the commodities are loaded in the cars, that being dependent upon the nature of the cargo permitting such practice. The first thing the Galveston Wharf Company does with the cargo that comes in over the Mallory and is deposited on Pier No. 24, which is leased by the Mallory Line, is to receive the billing from the Mallory Line and write is up in the check books. So far as the cargo itself is concerned, as soon as there is a sufficient lot of goods deposited on the wharf the labor forces of the Wharf Company are put to work under the supervision of the check clerks to load such goods into cars. That is done as soon as it is practicable to do so. It depends to a great extent upon the discharge from the vessel. So far as the handling of the cargo is concerned, the first thing the Galveston Wharf Company does is to pick it up and load it in the cars. The Galveston Wharf Company picks up this cargo at Pier No. 24 and takes it to the cars for the account of the so-called Galveston Bay Lines, consisting of the I. & G. N., the M. K. & T., the G. C. & S. F. and the G. H. & S. A. Railways. If it is going over the G. H. & S. A., we pick it up and put it on the cars for the account of the G. H. & S. A. The G. H. & S. A. pays us for this in accordance with the loading charges under our Tariff No. 18.

When this cargo was unloaded that day, our records show that during the day the Galveston Wharf Company loaded into cars 45 cars of checked freight and 16 straight carloads from the "Concho". The Galveston Wharf Company, between 8:30 and closing time that day had loaded from Pier No. 24 out of the cargo of the "Concho' this many cars. The Galveston Wharf Company did not begin as soon as the boat began. It naturally has to wait until a sufficient lot of [fol. 72] merchandise has been put out to put a bunch of men to work.

Outside of the $5.000.00 a year the Mallory Steamship Company pays us for the rental of Pier No. 24 and others. We receive compensation for one service from the Bay Lines, and we receive compensation for another service from the Mallory. When the boat comes in, the Mallory, in addition to the rental, in accordance with Local Tariff No. 18, under Section 3, would be assessed as follows: "Rates

and rules governing the handling of traffic over the wharves and piers of the Galveston Wharf Company", wharfage rates in cents per hundred pounds, except as otherwise provided, applying on import and coast-wise traffic inward. There are various and sundry charges depending upon the commodities handled. This is not the charge per cargo. It is a charge on per hundred pounds basis. When we get the billing from the Mallory Line, it is used for the purpose of ascertaining what is in the cargo and for the purpose of collecting these charges. We are furnished, in addition to that, a memorandum from the Mallory Line showing the tonnage in each vessel after it is discharged, and our charges are based on that statement. The Mallory Line did not have any agreement or understanding to pay us for any services other than for the use of the piers by monthly rental, and for a charge on the tonnage of the boat for the use of the piers. That is the only service we render them. As to whether the Galveston Bay Lines, the G. H. & S. A., have any understanding or agreement with us that we should render them any service other than picking up the cargo on Pier No. 24 and taking it to the cars, that is all, so far as the loading feature is concerned. We, of course, perform the additional service of switching the cars. After loading the cargo we switch the cars from the track of the Galveston Wharf Company to the line of the G. H. & S. A., and they pay for that service. Absolutely, we have to determine in some way how much of the cargo we get from the [fol. 73] Mallory Line. We do that after we get the billing. After we get the billing and it shows so many sardines being unloaded, we do not take that billing as evidence of what we are going to pick up and take to the G. H. & S. A. We make a check on carload lots. That check is made when it is loaded. At the time of its loading in the cars, and the same is true of the L. C. L. There is no receipt given for any freight handled for the Mallory Line until such a service has been actually performed. We do not give a receipt until we pick the cargo off their leased pier and put it on the cars. In the course of dealing there with the Mallory Line and the G. H. & S. A., we did not at any time render any service other than what I have detailed about picking it up and loading it on the cars on behalf of the G. H. & S. A. and the use of the piers to the Mallory. These are the only two services we render. These are the only two we get any compensation for.

It was a very unusual performance for the Mallory Line to unload a whole ship in one day. It was very exceptional. When those cargoes are unloaded on the wharves, preference is given to the shipping out and loading of L. C. L. merchandise. By L. C. L. is meant check freight, various miscellaneous stuff. That is considered the high-class freight. After that is perishable commodities, such as potatoes. After that, such commodities for points that advance notice may have been received that consignees are in urgent need of same. That is given preference over everything else in the order named. As to perference given by direction of the Mallory Steamship Company, we get advices and requests from representatives of the Mallory Steamship Company. We also receive such requests from representatives of the different railroads asking that such carloads, if possible, be gotten out on a certain day because of the urgency of the situation, the consignee requesting same and being urgently in need of same. I do not recall, [fol. 74] in reference to this cargo, what preferences there were. The loading by the Wharf Company of the cars from this cargo onto the cars of the Bay Line is a good day's work. The ship knocking off at 5:30, it would take our forces a little after that to finish. The record indicated the last labor forces knocked off approximately at seven. Now, taking into consideration that these cars have to be switched, the cars have to be put in order to deliver to three different yards, and must be gotten over in time for the Highball trains. It is the practice, with few exceptions, to knock off around seven o'clock in order that that might be accomplished. There would certainly be nothing accomplished to load freight to twelve midnight and not get the stuff out on the fast trains. It might just as well lay over until next day. This cargo could have been loaded that night, but it would have necessitated pulling these tracks and another re-spot. That is an operating game you can readily appreciate. It takes time to pull tracks and get them out of the way and spot cars. If that were done, it would mean the labor laying around waiting. It would not be considered good operating, from an operating standpoint.

At the time the fire occurred on January 13th the Galveston Wharf Company absolutely had done nothing to

take possession of the shipment of sardines. They had not handled it in any way. At the time of the fire they had not begun to start the service they were going to be paid for by the G. H. & S. A. In our rules and regulations, I find the provision in reference to our liability, under Section 3: "Rates and Rules governing the handling of traffic over the wharves and piers of the Galveston Wharf Company".

The Galveston Wharf Company then introduced in evidence the following part of said rates and rules:

[fol. 75] "This company does not engage in the business of storage or warehousing of property on its wharves or piers, and will not be responsible for loss or damage to property remaining thereon. All property landed or received on any of its wharves or piers is thereafter at the risk of the owner. This company reserves the right to remove any or all property to any part of its wharves at its convenience and at the risk and expense of the owner, or it may be removed and stored elsewhere than on the wharves and piers without notice and at the risk and expense of the owner, and this company will retain legal possession of all property so removed until all charges are paid.")

It has been the practice for many years that when the "Concho" came in there with this cargo, it is unloaded on the wharf, and we pick it up and put it on the cars. The cargo we did pick up and load into the cars, and the G. H. & S. A. paid us for those cars under the tariff we have just referred to for the loading charge, and so did all other lines for whom service was performed. Now, if the fire had not occurred, and we had picked up this cargo of sardines and placed it in the cars, under the practice and course of dealing the G. H. & S. A. would have paid us for loading charge outlined in the tariff. When we give a receipt to the Mallory Steamship Company after we have checked the cargo and loaded it into the cars, we give it for the account of the interested Galveston Bay Line. Absolutely, we never give a receipt as of date or time prior to our picking up the cargo and loading it into the cars. It is given only on the date the freight actually is picked up and loaded into the cars.

(The Galveston Wharf Company then introduced in evidence copy of tariff, marked Exhibit "D", attached hereto and made a part hereof.)

The contract introduced in evidence by the Mallory Steamship Company and the Galveston Wharf Company has a provision in it in substance that the Wharf Company might use the piers for some other purpose, provided the business of the Mallory Line did not require the complete use of the piers. At the time this fire occurred on January 13, 1926, the Mallory Line was exclusively using Pier No. [fol. 76] 24. The tariff provision of the Galveston Wharf Company in reference to the charge made by the Galveston Wharf Company for loading is Local Tariff No. 18—I. C. C. No. 28. This tariff covers all services rendered for account of the steamship line and rail lines. This particular tariff on loading covers the loading and unloading to and from cars, and wharfage charges. When cars come in from the interior for export, say from the G. H. & S. A. or G. C. & S. F., or any railroad, for shipment over the Mallory Line, the Galveston Wharf Company makes a charge for unloading the goods from cars to the Mallory docks, but the Mallory Line does not do export business, only coast-wise, and this applies to coast-wise business.

I have a copy of the original bills that we sent to the G. H. & S. A., and which were paid, for the services we rendered in picking up the cargo of the "Concho" and loading it on the cars. These bills were based on the tariff charge I referred to a while ago.

At the time this fire occurred in January, 1926, where a steamer of the Mallory Line docked and unloaded its cargo on Pier No. 24, after that cargo was unloaded on Pier No. 24 the first thing the Galveston Wharf Company did in reference to said cargo would be to pick up the cargo and place it in the cars for the account of the Galveston Bay Line concerned. That was the only thing the Galveston Wharf Company did with reference to the cargo after it was put on Pier No. 24, except that after loading was accomplished, the cars would be switched to the respective railline, and for this switching another charge was made, a switching charge. When the car-load lots were picked up from Pier No. 24 and taken and put into cars, these carload lots would be checked at the same time. Sometimes they

would be checked during the process of loading, and sometimes after the commodity was placed in the car, if the commodity would permit of such a count. If the car was checked from the pile on Pier No. 24 before it was placed in [fol. 77] the cars, and later receipt was given, the receipt would be based upon the check of the loading which was accomplished for account of the Galveston Bay Line. If it was checked after it was put in the car, and the Galveston Wharf Company gave a receipt, that receipt would absolutely be based upon the check in the cars. In either event, whether checked on the pier or in the car after loaded, the receipt that would be given by the Galveston Wharf Company would be based on the check.

Before the steamer arrived, the billing was furnished, according to the testimony of the Mallory Line, to the Galveston Wharf Company, and that is correct. When the billing was furnished, our clerks made entries from billing into the check record book. This book was for the purpose of checking the freight as it was loaded. After we did that, we would send the billing to the interested rail line. If the shipment was going over the G. C. & S. F. we would give the billing to that company. If over the G. H. & S. A. we would give it to that company. As to when the billing would be given in reference to the arrival of the ship, it would depend; usually it gets in a couple of days ahead of the arrival of the steamer. Sometimes it misses entirely, but that is unusual. As a rule it would be delivered to the railroad before the steamer arrived.

At the time this fire occured, the Mallory Steamship Company did not have any depot or other place for the reception of freight, or unloading of freight, or for receiving of out-bound freight, other than these piers there at Galveston. These boats that come into Galveston, such as the "Concho", frequently contained local shipments consigned to consignees at Galveston. Every ship has local freight, local destination, but the Wharf Company is not interested in the local proposition. The local freight is held on the pier and delivery is made to the consignees by Mallory [fol. 78] Line's forces from these same piers. That is the only place where they transact their business of receiving freight and discharging freight, on these piers that they rent from us.

In explanation of what I said on yesterday, that we could not have loaded all the cars on that day, the usual handling of the ship, Mallory, for instance, is that the check freight, perishable carloads and hot carloads—what we term "hot" are those that are wanted with dispatch—are gotten out the first day and as many additional carloads as possible, and the general average of handling these vessels will show that the remainder of the carloads are always forwarded on the second day. We make it a point to get out as much of this freight as possible, having in mind that dispatch means more business. There is competition, and naturally the quicker you get the freight to destination, the more business you will get. Therefore, an effort is made to get out everything we can on the first day. However, just as a matter of information, the loading and unloading service we perform for account of the rail lines is a losing proposition to us. We always lose money on it. Our rates carried in this tariff are based on straight pay. For instance, we pay our labor 40¢ an hour. The understanding with this labor is that they have an 8-hour day. If it goes to ten hours, they are paid pro rata; in other words, the same as 8-hour basis. When it goes beyond that, it is time and a half, and after seven o'clock would go into penalty time, and we would have paid 60¢ an hour, and our losses consequently would be heavier. Another feature is, of course, that we must get these loads to connecting lines in time for their fast trains, and I get a report on my desk every morning by nine o'clock showing the time these deliveries are made to the Galveston Bay Lines, and if they don't get there in time, we find out why that performance was not made. As a rule and at the time the Mallory steamships came in and [fol. 79] docked at the pier, all unloaded one day, or part one and part the second. The unloading of the steamer in one day is the exception and not the rule. Ninety-nine out of one hundred steamers will run into the second day. The unloading of the ship would require more than a day. As a rule the loading of the cargo onto the railroad cars would take more than a day. It would take a day to clear the check freight, perishable carloads, those carloads that want dispatch and as many additional carloads as possible. The remaining carloads would stand until next day. That is the

usual program, and I think the record will show that to be a fact. Of course, if we had anticipated that there would be a fire that night, I might have gotten extra employees and loaded those cars.

The Galveston Wharf Company did not receive any compensation or have any understanding to receive any compensation for rendering any service either to the steamship lines or rail lines or anyone else, except for picking up the cargo from Pier No. 24 and taking it to the cars, and then switching the cars, and the wharfage charge to the steamer. We received no other compensation other than that carried in Tariff No. 18. We are not parties to any division of the revenues earned by the rail lines.

Cross-examination.

By Mr. Culwell:

I think the Galveston Wharf Company is recognized as a common carrier. I believe it has been declared so by the Interstate Commerce Commission. We make the same reports to the Interstate Commerce Commission that other common carriers make. We have approximately fifty miles of trackage and operate some eight or ten engines. We own eight. We have our own crews, our own yard forces. We operate our own yards and anything that comes into the Galveston wharf that is bound inland is handled by the [fol. 80] Wharf Company to the junction of the connecting line. So that in handling shipments arriving in Galveston by steamer being destined to points in the out-country, we perform that character of service for it. Our handling is for the account of the railroads. The loading is for the account of the rail lines. The railroads and respective lines for which we are doing the particular service pay us as per bills rendered. All these charges are determined by tariffs issued. We do for the account of the railroads, the particular line involved, and as its agent execute such receipts as may be executed, showing that the goods have been received. We sign for such goods as have been received for the account of the rail lines. That is known by the railroad company. It has been in effect for years. When we pick up a car of freight and execute to the Mallory a receipt for the goods, that is recognized by the rail line. These record books are turned over to the rail line. They have them in

their own office. After this service has been performed these records are turned over to them, and they use them in their own office for claim reference purposes.

I am sure it is the practice that at about the time of the departure of the "Concho" on the present voyage 112, the bills of lading covering the shipments that are in that boat are forwarded immediately by United States mail to the Mallory Line at Galveston. The Mallory forces and our check clerk forces had connecting offices on Pier No. 25. These bills go down to the Mallory Line clerk, and he passes them to our clerk. We make the necessary entries and pass these bills to the interested line that is going to handle it out of Galveston. Now, as a rule, all the work has been accomplished before the arrival of the boat. Before the arrival of the boat we turn over the same way bills that are turned over to us to the connecting carriers. In a general way this billing shows shipper, consignee, points of origin and destination, the commodity, weight, rate and freight, [fol. 81] practically the same information that appears in the bill of lading, in addition to weight, rate and freight extension. When the boat got to Galveston, so far as I know there was no difference in handling of the "Concho" on Voyage 112 from others. When that boat got to the pier and docked, the force of the Mallory unloaded it. As to a space being assigned on the wharf where they separate the car load shipments from L. C. L., I will say that that is attempted. There is an imaginary line where they attempt to deposit the check freight, make such delivery, and the carloads are usually placed by the Mallory to their best advantage. When I say that, the Mallory of course known that it is more expensive to truck a shipment a longer distance, and they will make a short cut and cut that down as much as possible. They have electric conveyors, but the custom there is to place the cargo in certain places as much as possible. There is, in a general way at least, a kind of assigned territory there for different rail lines. The cars are spotted opposite in the same manner. The night before this boat got to Galveston, both the Galveston Wharf Company and the G. H. & S. A. should have known from the billing that there was a car of sardines on that boat destined for El Paso, routed over the G. H. & S. A., or S. P. Our forces are at liberty to begin the loading as soon as the freight is put on the wharf, but the practice is to wait until there is a sufficient amount deposited there to keep the labor

busy. Otherwise, it is not a paying investment. It is our privilege to begin loading as soon as it is put on the wharf, unless a hold order is put on some specific shipment, which happens only occasionally. So that as soon as freights were deposited on the wharf by the forces of the Mallory, there was nothing to prevent our forces from immediately picking it up and trucking it to the cars. That was all left to the [fol. 82] judgment and discretion of the Galveston Wharf Company's supervisor of forces on the docks. It was not a matter within the control of the Mallory Line. Before the fire I made it a business to go over to the docks about once a day. I have a good many things to do. I have men there hired to look after the particular work in connection with the loading of this stuff. They are responsible to me for the way they do it. The railroad companies knew of the freights that were coming routed by their lines, and they were supposed to have the cars in there. That matter is handled in advance. Our man, with our yard office, orders for this equipment. If we haven't the cars in the yard, they are delivered to us by the interested Bay Line, and we spot this equipment in accordance with the instructions of the dock department. We try to spot these cars that take out S. P. freight on the tracks that are most convenient to pick up the freight that goes out on that line. On the day of the fire these cars had been spotted in the usual manner, and the cars were there. As the freights were placed on the wharf by the Mallory Line, it was purely a matter of the Wharf Company to determine just how and when to load the particular shipment in the usual manner. I have testified that we tried to give preference to perishable, and, likewise, to freights that we had notice were regarded as rush orders, so that if we had a shipment that was designated as a rush shipment, we would endeavor to give that prior good handling to insure dispatch and satisfy customers. In a case of a rush order, carload shipment that was billed—marked rush, that had been placed at the usual point on the wharf, say, by three or four o'clock in the afternoon, if there was a special request made by the Mallory, or if there was a special request made by a representative of the railroad with reference to that particular car, every effort would be made to have it loaded and gotten out. If it was a request of the shipper, we have no connection [fol. 83] with the shippers. The shippers don't know us. They look to the Mallory or to the railroad, and such a re-

quest would not be made of us. We recognize the fact that the steamship line and the rail carriers are really the interested lines, and if there is anything they want to get out, and make a special request, we of course make every effort to get it out. We had access to the billing. We knew its destination. I notice that the original bill of lading has a notation "Rush with Tracer". That means that a man wanted to get his goods through as quickly as possible. It may also mean that such notation is not put on the original billing. It might also mean that the agent at point of origin did not follow it up. That I am unable to say. It is customary in the railroad game for that notation to be on the billing too. It was on the bill of lading. I don't know with reference to the billing. In this particular shipment in its usual course, it would have been billed at point of origin undoubtedly to New York, and New York undoubtedly rebilled the shipment. Positively I cannot say. I only take it for granted. If the man at point of origin failed to put it on the billing, the Mallory at New York certainly would not have put it on theirs. I cannot say positively that in the ordinary course of handling it should have been on. I only take it for granted. We presume that every man is supposed to do his duty. Charitably inclined as we may be, we assume that everybody tries to do his duty at least. Exercising that mantle of charity, if everybody attended to his business, that notation should have appeared on the billing. I do not know anything to the contrary. I did not see the billing. Assuming that everybody religiously did his duty, when the Wharf Company got that billing, the notation was on it. A notation of that kind should be given some attention. It ought to be recognized. As to whether on these assumptions that the Mallory Line did its duty and unloaded it, and the evidence showed that everything was all [fol. 84] right by four o'clock, and that shipment ought to have been loaded out, I cannot say. If such a notation appeared on the billing, it should have been recognized, it seems to me, and some effort made to get it out. I would have attempted to do it. The Galveston Wharf Company tries to do that way. I cannot say that this shipment was unloaded and was in the fire. It was reported to us that it was on the pier. We had no check on it, and we could not verify as to its really having been on the pier. I believe it was not found on the ship after the fire. Apparently it was never delivered to destination. The man has made claim

for it. After this shipment has been placed at the designated point, you ask what else in the further handling of that shipment was there to be done by the Mallory. There was the coopering feature. After this had been O. K.'d and it was all right in every respect and deposited there by the Mallory Line, the next thing in order would have been the loading into the cars by our forces if it was ready to go. It is the Mallory Line's usual performance to deposit it on the floor, and it is picked up and loaded into the cars by the Galveston Wharf Company. As to the particular time it is picked up, that is wholly in control of the Wharf Company. After it had been placed, and it was O. K.'d to go, we were at liberty to pick it up and send it forward at any time we got ready, and it was not necessary for us to ask permission of the Mallory Line about it. Unless there is some special feature connected with it, as a hold order, the usual course is to load it and get rid of it. So far as the actual physical handling of the shipment from the time it is put, and assuming that it is ready to go, that is under the control of the Wharf Company. The Mallory Line never has required, so far as that boat is concerned, for is to give them a receipt for what we picked up before we loaded it. If they had requested it, I am sure they would not have got it. No, I [fol. 85] cannot say that the receipt business is a mere formality. Of course a receipt is the best evidence in the world, and unless Mr. Rennie is furnished these receipts, he makes a kick. He wants to complete his record. If a question comes up, he wants to know if he made delivery. If a man at destination gets the stuff and claims a short, or any other complaint, these receipts are given to show record handling. In the same manner that they take receipts for city delivery freight. As to whether the giving of the receipt has anything to do with the picking up of the freight and moving it, the freight is moved and must be loaded into the cars before the receipt is given. Whether we generally get these receipts to the Mallory for two or three days afterwards depends. We endeavor to give them receipts as soon as we can. Of course a receipt cannot be given the same day, because everybody is busy loading the stuff. We cannot double our forces just for that express purpose. Yes, we endeavor to handle the freights that are loaded during the daytime on the cars promptly and move them out promptly. If we get a car loaded that is going to the G. H. & S. A., if we have several, we try to wait until

they are all loaded and make a clean-up in the movement. We make the endeavor to get them out that night to our connecting lines in time sufficient to have them put in their fast trains, so that they will get to destination without delay. The whole thing is highly competitive. The railroads in turn move these shipments out of Galveston just as fast as they can. In the meantime the Mallory Line has no receipts. It gets its receipts the following day, or as soon thereafter as possible. In the meantime the freights are absolute- gone so far as the Mallory is concerned, and I think they depend upon the well-known integrity of the Wharf Company to see that the receipts are forthcoming. It is just a matter of confidence, but in the meantime the possession of the stuff is away from them and out of them. It has left their possession.

[fol. 86] The contract that I was speaking of between the Mallory Steamship Company and the Galveston Wharf Company, I think was executed in 1914. It provided for a rental charge of $5,000.00 per year. If it is a fact that the Mallory has not paid us any rent since December, 1925, I have not been advised of it. If they have not, then they certainly owe us the amount, and it should be paid according to the contract. The contract speaks for itself. It was a five-year contract. It expired, under its terms, in 1919 and renewed itself automatically. I don't think there was any specific mention made of any effort to give the same sort of rates and privileges based upon what other coastwise vessels pay. Clause XIII of that contract reads:

"After the expiration of the term of Five (5) years hereinabove provided for, the Wharf Company agrees and obligates itself to give to the Steamship Company a preference right for the use of the space hereinabove described under the same terms and conditions as herein specified, provided the business of the Steamship Company and the number of vessels loaded and unloaded at said piers by it and its affiliated lines shall after said five (5) year period continue to justify the Wharf Company in assigning to the Steamship Company so much space, and provided further, that after the expiration of said five year period, the shed hire which shall be paid by the Steamship Company to the Wharf Company (which is hereby fixed at Five Thousand and 00/100 Dollars ($5,000.00 per annum for said five (5) year period) shall be based upon compensation to the Wharf

Company equal in amount to that which shall be paid by other Steamship Lines or agents at the Port of Galveston for space of equal extent, and after the expiration of said five (5) year period, the annual amount to be paid by the Steamship Company to the Wharf Company as such shed hire shall be fixed and determined during each year in which this contract is in force by amounts paid to the Wharf Company during the same period by other steamship lines and agents for equal space. Such compensation to be paid by the Steamship Company to the Wharf Company to be in addition, however, to all wharfage and other charges provided for in the tariffs filed and hereafter to be filed by the Wharf Company."

No, sir, the Mallory Line did not notify the Wharf Company in 1925 that it would no longer pay the $5,000.00 a year rental. If the Mallory refused to pay our bill rendered for the month of December, 1925, on the ground that the Luckenbach people were not having to pay it, and that they were highly competitive, I know absolutely nothing [fol. 87] of it. I am satisfied that the bill has been paid. If the Mallory has not paid since December, 1925, there must have been method in their madness, because the fire occurred on January 13th, and they thought probably they might get under from something. However, I shall be very glad to investigate that when I get back.

I think the record shows that on the day of the fire we had about 150 men at work. That was about the average force. We used them right along, because they had become efficient in the service and knew what was expected of them. I testified this morning that we usually got out the L. C. L. stuff the first day, and that the carload stuff sometimes waited until the second day. There is a decided difference in the handling on the Galveston Wharf Company's wharves and that on the Morgan Line. The freight on the Mallory Line is deposited on the floor of the pier. The Morgan Line, in loading their ships at New York loaded them in a manner that will insure the different commodities coming out of that vessel and that will permit them, on its arrival at Galveston, to load direct into cars, and that is done with very efficient effect with the Morgan Line. With the Mallory Line we cannot do that, because in their loading scheme they don't load freight in the ships that

will permit of such. We have asked the Mallory Line to do that time and time again, but it seems impossible to get the New York end to work up that efficiency. So far as less than carload shipments are concerned, the Morgan Line handles quite a percent of the entire cargo direct to the cars. Their pier, of course, is a little differently constructed. However, as I said, the loading of their ships has a great deal to do with that. The average Mallory steamship coming in runs about 1200 tons, or a little more. This vessel had 1080 tons, a little less than usual, and as already stated, this is one of the exceptions of the general rule of the ship being entirely unloaded on the first day. This [fol. 88] ship was unloaded on the first day, and the records will show that the Wharf Company did not entirely load it out on the cars. If we had had a sufficient force of men there, I do not think we could have loaded all the cargo on that day. We had the usual force, and the same labor at the Mallory as usual. It may be in certain seasons of the year when the forces are reduced in extent, because we cannot keep them busy, we like to give them a day's wage. In this particular instance the usual handling, so far as the Wharf Company is concerned, for account of the Galveston Bay Lines was given. It is not a fact that the question of the saving of expense to the Wharf Company was the prime reason that these shipments were not all moved onto the cars that day. We load shipments, or load cargo from shipments, and have put in some overtime occasionally. We do that because we want to give dispatch to the stuff. I believe I have already stated that these loads have to get to connecting lines in sufficient time to be put into their trains. If we don't do this, we receive a kick from every one of the railroads, stating that they cannot hold their trains for our cars, and if we don't get them over, they will run them, and our stuff will lay over. Our loading is a losing proposition, and our tariff charges are based on straight time to our labor. Our failure to load out all of the cargo was not entirely to prevent overtime. A delivery to the connecting lines had considerable to do with it. Our switch engine forces have to be given a reasonable length of time to switch these cars. They have to get them together. You know they do not all go to one railroad. They have to make delivery to three different yards.

The record shows that there were two other cars going over the Southern Pacific to El Paso that came out. I suppose the other cars had special rush orders on them. From the bill of lading it would indicate that this car had rush [fol. 89] order on it. We don't know how the billing read, if there is any tracer or special request from the railroad line or the Mallory to get the shipment out. I could not say whether one of the cars we got out was loaded with wire. It might be the other was loaded with Arbuckle's coffee. As to whether there was any reason why, with all three cars on the wharf, we should have given preference to handling these two cars, when, as a matter of fact, we make it a rule to make as few switches as possible to the particular line of railroad, it just so happened, I guess. I could not say from personal knowledge that the three cars destined for El Paso were in practically the same locality on the wharf. Possibly they were presumed to be. As I stated before, these carloads are often placed on the wharf by the Mallory Line to insure a very short trucking on their part, cutting down their trucking expense. It is apparent that three cars of El Paso freight were placed on the wharf. At what point on the wharf I am unable to say. I think the record shows that our forces did pick up the two cars that came forward. There was no one else to pick them up. We were not just as much in possession of the third car there as we were of the two that came forward. Personally, I cannot say that there was any reason why the two cars were picked up and the one was left. There was no one connected with the Mallory Line that I know of that prevented us from picking up the third car. It is possibly so that if we had been willing to pay overtime there was no reason why this car could not have been loaded. As already stated, that carload was handled approximately in the same manner as all other cargo. We aimed to finish about seven o'clock, and apparently there was no rush order or other special request on this particular car, or I am confident the same would have been loaded. I do not know whether there was any rush orders on the [fol. 90] two cars for El Paso. There might have been. Possibly there were. I don't know.

I have stated that the Mallory Line had no other depot at Galveston. As to whether we have any other depot, where we pick up freight our property extends from Piers 10 to

41. The particular wharf where this unloading is done is not our depot. That particular wharf is the depot of the Mallory Line, allocated to it for the express purpose of handling inbound and outbound cargo. The Wharf Company had absolutely nothing to do with it. The allocation was for the account of the Mallory Line. The Wharf Company was interested only in loading out the freight into cars and unloading cars destined to the Mallory Line northbound. The property is ours, but it is allocated to the Mallory Line. Our forces work there in the performance of the duties for the account of the rail lines, in picking up this stuff and loading into cars and unloading from cars, and placing in their northbound berths for loading into their steamers. Our clerks have offices there. We have representatives and clerks on every pier. They cover a certain territory where a similar service is performed for other steamship agents. As already stated, numerous times we load the stuff for account of the rail lines at that pier as well as at other piers. They are all our piers and are allocated to steamship agents. They are allocated to the steamship agents, so that they can unload there. That is what they pay us for. I cannot say we use it for our own good. It is a facility of ours from which we are supposed to make money. Of course we do enjoy some revenue on the wharfage, but as already stated, it is a losing proposition on the handling of freight.

(Here the court asked the attorney for Mallory Line if he had a copy of the billing. He replied in the affirmative. The G. H. & S. A. Railway Company produced copy of billing, and the court called attention to the fact that the [fol. 91] billing did not show a rush order.)

The Wharf Company is not in the local business and does not receive local shipments at that wharf. We accept shipments for account of the railroads at the same wharf. We will receive at these piers any and all freight tendered for the account of the railroads, and we accept it for the account of the carriers and do the switching necessary to get it to the designated railroad. Whether we have enough track space there to handle and place the necessary cars to handle the ship's cargo depends on the size of the cargo. We had spotting room at that time for approximately 65 or 70 cars. We anticipate the arrival of a steamer by spot-

ting the cars on the track the night before the boat is presumed to arrive.

Cross-examination.

By Mr. Kemp:

I testified that Mr. Rennie always insisted upon the receipts for his records. In this particular case we never issued any receipts to the railroad on this car of sardines, and the reason we did not deliver those receipts or issue them was that there had been no delivery.

The Mallory Line handled the salvage from this fire.

Recross-examination.

By Mr. Culwell:

I do not know for whose account. I did not see any of it. I cannot say that the salvage was handled by a man by the name of Glee. I do know, however, that it was handled for the account of the Mallory Line. They made disposition of it through Mr. Rennie's forces. Possibly they hired the salvage man, possibly at the request of the underwriters.

Redirect examination.

By Mr. Wright:

In answer to questions I have stated that on January 13th after this cargo, including this shipment, was placed by the [fol. 92] Mallory Line on Pier No. 24, which was leased by us, there was nothing to prevent our picking up the cargo and loading it into the cars. The Galveston Wharf Company had not done anything to that cargo, including this shipment, that was burned in the fire. They had not done any act in reference to taking charge of it, or hold of it, or moving it, or anything else. The record shows that there were twenty-one cars burned in the fire. This was not the only shipment that was not loaded out and was burned. My answer to the effect that the Mallory took charge of the salvage at the request of the underwriters was my own thought. I don't know. I just supposed the underwriters had an interest there. I don't know that the underwriters had an interest. The only fact that I absolutely know about

it is that the Mallory took charge of it. I don't know at whose request.

(The court here struck out the testimony as to at whose request the Mallory took charge of the salvage.)

We do not have in the records of the Galveston Wharf Company a copy of the billing that was given to us for delivery to the railroad company.

(Here notice was given by Galveston Wharf Company to the Mallory Steamship Company and the Galveston, Harrisburg & San Antonio Railway Company to produce copy of the billing. It was produced by the Galveston, Harrisburg & San Antonio Railway Company's counsel and introduced in evidence by the Galveston Wharf Company, copy of which is hereto attached, marked Exhibit —, and made a part hereof.)

Mr. Culwell asked me some questions about receiving freight on account of the rail lines on Pier No. 24. The Galveston Wharf Company did not receive freight for its own account. In this particular case, from the "Concho", the freight would be unloaded by the Mallory forces and placed on the pier. There would be no freight coming from the other way going out on the Mallory Line placed on this pier. All of that outbound freight was on Piers Nos. 25 [fol. 93] and 26. That is the northbound berth, and no freight was handled on Pier No. 24 except freight coming from coast-wise ships on the Mallory Line and unloaded, coming from New York and destined Galveston, southbound. That freight going out on connecting lines we picked up and loaded into cars in the ordinary course of business.

Recross-examination.

By Mr. Culwell:

It is not true that when the Galveston Wharf Company's loading forces see a shipment placed out of the boat on that wharf that is going forward, we regard that as notice from the Mallory Line that this stuff is here ready to go forward and pick it up. We would know that the freight is placed there for the purpose of loading into cars. Now, the usual practice is to pick it up when these carloads are made complete and load it into cars for account of the

interested Galveston Bay Line. You asked me if it is not understood between the two of us; that is, the Mallory Line and the Wharf Company, that when they place it there, the intention is for us to take it on. Well, the intent may be there, but there are certain details involved at times that void the intent. Our men do not O. K. the shipment. You asked me: "All right, after they put it in there, do you not understand from that, in effect, here, Wharf Company, is a shipment we are tendering you? Don't you understand that to be a fact?" The practice is that when it is found that such carloads are ready to go, when no exceptions are made by rail line representatives, or otherwise, that it is there for our forces to pick up for the account of the Galveston Bay Line, and load into cars. The G. H. & S. A. has and had on that occasion, an inspector, who had a clerk or two under him. I think Mr. Reed was the Bay Line representative on duty at that time. He is their regular representative. He was a direct representative of the G. H. & S. A. He serves all the Galveston Bay Lines. In the [fol. 94] handling of shipments going out on the Southern Pacific, he acts for it there in this capacity. He looks after certain interests for them.

Redirect examination.

By Mr. Wright:

As to the understanding at the time of this fire as to when the Galveston Wharf Company took possession, the general understanding was that the shipments are taken possession of when they are lifted from the floor of the pier and deposited in the cars by the Galveston Wharf Company's forces for account of the Galveston Bay Lines.

Recross-examination.

By Mr. Kemp:

Mr. Reed is a joint man and represented all the Bay Lines, the Katy, the G. C. & S. F., the I. & G. N., and G. H. & S. A. and other lines. He looks after the rail lines' interests principally, I understand, from a loss and damage standpoint. He looks after their interests in determining the condition of the stuff over their lines, and that is all.

Redirect examination.

By Mr. Wright:

In stating that we lift cargo or shipments from Pier No. 24, I mean when it is placed on trucks, when it is picked up by the labor and placed on trucks and hauled to cars. If the fast train of the G. H. & S. A. left at 9:25 on the night of the fire, we would have had to complete loading by seven o'clock in order for them to catch that train.

Cross-examination.

By Mr. Culwell:

We would have to do this in order to give us time to switch these cars to get them to the connecting line's yards and give the rail line time to segregate them and put them in their trains. That would leave a matter of two hours [fol. 95] and twenty-five minutes, and even if these cars had been sealed and to go at exactly seven o'clock, it would take every bit of that time to accomplish such service. We take these cars out approximately two and one-half miles in some instances, and in others about three miles. It is true that the railroad has already had the billing in their possession. The cars are sealed by our forces. When we tender them to the railroad company, it is not true that all they have to do is to couple up and go. There is switching necessary. They have to pull those cars out. We have to make delivery to the M. K. & T., the I. & G. N., the G. C. & S. F. and the G. H. & S. A. These cars have to be lined up for those respective lines. It takes a little time to do that. When the other fellow gets them, he has to perform approximately the same duty. He puts his car in his train according to station order, to a great extent, and a similar service, you might say, is performed. As an operating man, I consider two hours and twenty-five minutes good service in getting those loads from the pier and putting them in the other fellow's train. As to whether, if we had put a shipment in the car at 6:30 we could have moved it out by seven, I say we cannot move any of those cars until the last car is finished. The record shows that the last labor was knocked off at seven. Possibly it might have taken a little while to have completed the sealing of all the cars. I do not know how many cars the G. H. & S. A.

were running out of Galveston. Whether they run extras depends on tonnage, I think. I am not familiar with their operation with the Morgan Line and do not know whether the G. H. & S. A. trains leave until they finish loading from the Morgan Line. It is possibly true that at the same time the Mallory Line is loading on the G. H. & S. A., the Morgan Line is doing the same service on other cars. I could not say whether they all go out on the same train, as I don't know anything about the G. H. & S. A. operation, [fol. 96] as I say I don't know anything about their operation game. However, the endeavor of every rail line is to get out every load possible. If they have the tonnage, they run them. It may be on occasions they run extras, but the regular scheduled trains, the one we work up to is their regular scheduled train departing at 9:25. It is possible that this same train takes the Morgan Line freight. I could not say positively. I understand that the Morgan Line works at night.

AGREEMENT

We agree that the above and foregoing forty-five pages contain a full, true and correct statement of all the facts admitted in evidence by the Court upon the trial of this cause, and we further agree that this statement shall be filed as statement of facts in this case.

Fryer & Cunningham, Attorneys for Plaintiff. Turney, Burges, Culwell, Holliday & Pollard, Attorneys for Defendant Mallory Steamship Co. Kemp & Nagle, Attorneys for Defendant Galveston, Harrisburg & San Antonio Railway Company. Thompson, Knight, Baker & Harris, Geo. S. Wright, Attorneys for Defendant Galveston Wharf Company.

Sept. 12, 1927. Examined, approved and ordered filed.
W. D. Howe, Judge.

(Here follow Exhibits 1 to 9, side folios 96-a-1 to 96-a-10, and Exhibits "A" and "B," side folios 96-b and 96-c)

Eastern Transportation, March 15, 1922

EASTERN TRANSPORTATION COMPANY

UNIFORM ORDER BILL OF LADING CO.

(PRESCRIBED BY THE INTERSTATE COMMERCE COMMISSION)

Shipper's No. R.6016

ORIGINAL

Agent's No. .....

ject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

t., Maine, Dec. 23, 1925. 50030, 192

o-operative Sardine Co.,

ehow, in apparent good order, except as noted (contents and condition of contents of packages unknown) marked, consigned and destined as indicated below, word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained including conditions on hereby agreed to by the shipper and accepted for himself and his assigns.

of this Original ORDER Bill of Lading properly indorsed shall be required before the delivery of the property. In- covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this g or given in writing by the shipper.

(Mail or street address of consignee—For purposes of notification only)

RDER OF Maine Co-operative Sardine Co.,

l Paso State of Texas. County of

ricnn Grocery Co.,

Paso State of Texas. County of

Southern Pacific Car Initial Car No.

(Delivering carrier)

Description of Articles, Special Marks and Exceptions	*WGT. Sub. to Cor.	Class or Rate	Check Col.
Banquet Keyless 1/4 Oil Sardines			
Banquet Key 1/4 Oil Sardines			
Banquet Keyless 1/4 Must. Sardines			
	47310#		
Rush with Tracer			
			573808

If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of conditions.)

(Signature of consignor)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per (The signature here acknowledges only the amount prepaid.)

Charges advanced:

$

ver between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's

e rate is dependent on value, shippers are required to state specifically in writing the agreed or property.

eclared value of the property is hereby specifically stated by the shipper to be not exceeding per

operative Sardine Co. The Shipper. H. A. Bourque Agent

Per

ess address of shipper

Manufactured by Bacon Manifold Co., Portland, Me. 6924

ENDORSEMENTS

MAINE CO-OPERATIVE SARDINE COMPANY

Treasurer

CONTRACT TERMS AND CONDITIONS

Sec. 5. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner of the property, or natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of free time allowed by the tariffs, namely, on the (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) The time of transportation of the property may be discharged at risk and expense of carrier, when such discharge is required by quarantine regulations or authorities, or by the carrier's disposition at intermediate available point in carrier's option, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at carrier's option to shipping point, whereupon freight shall be due and payable as if transportation had been completed. Quarantine expenses of whatever nature or kind levied upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection, or other acts required or done by quarantine regulations or authorities, even though the acts may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or discrepancy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the fumigation of the property covered by this contract less any place against the quarantining laws or regulations in effect at such place.

Sec. 6. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the value thereof, the property is carried at such lower valuation, and no carrier assuming such lower valuation shall be liable for loss or damage in excess of such valuation. And where rates are based upon such valuation, the shipper shall be required to state the actual value of the property in writing at or prior to the time of shipment. The amount of any loss or damage for which any carrier or carriers may be liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges if paid, unless a lower value has been represented in writing by the shipper or has been agreed upon in writing as the value thereof, in which case such represented or agreed value shall be the maximum amount to be paid by any carrier on account of any such loss or damage, whether or not such loss or damage occurs from negligence.

(b) Unless the loss, damage, or injury to property must be made in writing to the originating or delivering carrier or successor having title of holding within six months after delivery of the property (or, in the case of export traffic, after the expiration of the free time allowed at the port of export, if such property is not delivered by the carrier within such period), and unless suit thereon is instituted within two years and one day after notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Provided, That if such loss, damage, or injury was due to delay or failure to deliver, or discrimination, or was caused by fraud, then within two years from the time a reasonable time for delivery has elapsed; provided that

96-a-3

Customer's Order No. 12/11/25 Our Order No. 6020 Invoice No. 7336

Eastport, Maine, DECEMBER 23 1925

C. H. LAWRENCE
EL PASO TEXAS

To Maine Co-operative Sardine Company, Dr.

EASTPORT, MAINE

TERMS: Less 1 1-2 per ct. 10 days from date of invoice
Sales made f. o. b. Eastport District Rate of Freight

BROKER NASITS SALES COMPANY

NUMBER OF CASES		PRICE	AMOUNT	NET AMOUNT
200	1/4 OIL KEYLESS SARDINES BANQUET	4.10		820.00
	DRAFT B/L ATTACHED THRU STATE NATIONAL BANK			
	A TRUE COPY. CERTIFIED CORRECT. MAINE CO-OPERATIVE SARDINE COMPANY BY E. F. Hutt, Agent			
	IN POOL CAR TO R 6016 AMERICAN GROCERY CO. EL PASO TEXAS			
ROUTE	SEAPORT NAVIGATION COMPANY			
PACKER	L. D. CLARK & SON			

We hereby guarantee to the purchaser of the articles of food described in this invoice that they are not adulterated or misbranded within the meaning of the Food and Drugs Act, June 30th, 1906, or any amendments thereof. No claims for swells will be allowed after six months from date of this invoice.

2. 3-25-2000

96-a-4

Customer's Order No. 12/11/25 Our Order No. 6018 Invoice No. 7337

Eastport, Maine, DECEMBER 23 1925

WESTERN GROCERY COMPANY
ELPASO TEXAS

To Maine Co-operative Sardine Company, Dr.

EASTPORT, MAINE

TERMS: Less 1 1-2 per ct. 10 days from date of invoice
Sales made f. o. b. Eastport District Rate of Freight

BROKER NASI T'S SALES COMPANY

NUMBER OF CASES		PRICE	AMOUNT	NET AMOUNT
50	1/4 OIL KEYLESS SARDINES. BANQUET	4.10		205.00
	DRAFT B/L ATTACHED THRU STATE NATIONAL BANK			
	A TRUE COPY. CERTIFIED CORREC			
	MAINE CO_OPERATIVE SARDINE COMPANY			
	BY E. F. Nutt, Auditor			
	IN POOL CAR TO R 6016			
	AMERICAN GROCERY COMPANY EL PASO TEXAS			
ROUTE	SEAPORT NAVIGATION COMPANY			
PACKER	L. D. CLARK & SON			

We hereby guarantee to the purchaser of the articles of food described in this invoice that they are not adulterated or misbranded within the meaning of the Food and Drugs Act, June 30th, 1906, or any amendments thereof. No claims for swells will be allowed after six months from date of this invoice.

3-25-2000

Customer's Order No. 12/11/25 Our Order No. -6017 Invoice No. 7338

Eastport, Maine, DECEMBER 23 1925

FRANKLIN &GOODMAN
EL PASO TEXAS

To Maine Co-operative Sardine Company, Dr.

EASTPORT, MAINE

TERMS: Less 1 1-2 per ct. 10 days from date of invoice
Sales made f. o. b. Eastport District Rate of Freight

BROKER NASITS SALES COMPANY

NUMBER OF CASES		PRICE	AMOUNT	NET AMOUNT
150	1/4 OIL KEYLESS SARDINES BANQUET	4.10		615.00
	DRAFT B/L ATTACHED THRU STATE NATIONAL BANK			
	IN POOL CAR TO R 6016 AMERICAN GROCERY COMPANY EL PASO TEXAS			
ROUTE	SEAPORT NAVIGATION COMPANY			
PACKER	L. D. CLARK & SON			

A TRUE COPY.
CERTIFIED CORRECT.
MAINE CO-OPERATIVE SARDINE COMPANY
BY E. J. Nutt, Auditor

We hereby guarantee to the purchaser of the articles of food described in this invoice that they are not adulterated or misbranded within the meaning of the Food and Drugs Act, June 30th, 1906, or any amendments thereof. No claims for swells will be allowed after six months from date of this invoice.

3-25-2000

96-a-6

Customer's Order No. 12/11/25 Our Order No. 6016 Invoice No. 7339

CHAS. L. POMEROY & COMPANY
EL PASO TEXAS

Eastport, Maine, DECEMBER 23 1925

To Maine Co-operative Sardine Company, Dr.

EASTPORT, MAINE

TERMS: Less 1 1-2 per ct. 10 days from date of invoice
Sales made f. o. b. Eastport District Rate of Freight

BROKER NASITS SALES COMPANY

NUMBER OF CASES		PRICE	AMOUNT	NET AMOUNT
65	1/4 OIL KEYLESS SARDINES BANQUET	4.10		266.50

DRAFT B/L TTACHED
THRU STATE NATIONAL BANK

A TRUE COPY.
CERTIFIED CORRECT.
MAINE CO OPERATIVE SARDINE COMPANY
BY E. L. Mutt, Auditor

IN POOL CAR TO R 6016

AMERICAN GROCERY COMPANY
EL PASO TEXAS

ROUTE SEAPORT NAVIGATION COMPANY

PACKER L. D. CLARK & SON

We hereby guarantee to the purchaser of the articles of food described in this invoice that they are not adulterated or misbranded within the meaning of the Food and Drugs Act, June 30th, 1906, or any amendments thereof. No claims for swells will be allowed after six months from date of this invoice.

2. 3-25-2000

(L)

96-a-7

Customer's Order No. 12/11/25 Our Order No. 6021 Invoice No. 7340

Eastport, Maine, DECEMBER 23 1925

M. LESINKSY COMPANY
EL PASO TEXAS

To Maine Co-operative Sardine Company, Dr.

EASTPORT, MAINE

TERMS: Less 1 1-2 per ct. 10 days from date of invoice
Sales made f. o. b. Eastport District Rate of Freight

BROKER NASITS SALES COMPANY

NUMBER OF CASES		PRICE	AMOUNT	NET AMOUNT
200	1/4 OIL KEYLESS SARDINES BANQUET	4.10		820.00
	DRAFT B/L ATTACHED THRUSTATE NATIONAL BANK			
	A TRUE COPY. CERTIFIED CORRECT. MAINE CO-OPERATIVE SARDINE COMPANY BY C. F. Rutt, Auditor			
	IN POOL CAR TO R 6016 AMERICAN GROCERY CO. EL PASO TEXAS			
ROUTE	SEAPORT NAVIGATION COMPANY			
PACKER	L. D. CLARK & SON			

(f)

We hereby guarantee to the purchaser of the articles of food described in this invoice that they are not adulterated or misbranded within the meaning of the Food and Drugs Act, June 30th, 1906, or any amendments thereof. No claims for swells will be allowed after six months from date of this invoice.

Form 2. 2-25-2000

2

Customer's Order No. 12/11/25 Our Order No. 6019 Invoice No. 7341

AMERICAN GROCERY COMPANY
EL PASO TEXAS

Eastport, Maine, DECEMBER 25 1925

To Maine Co-operative Sardine Company, Dr.

EASTPORT, MAINE

TERMS: Less 1 1-2 per ct. 10 days from date of invoice
Sales made f. o. b. Eastport District Rate of Freight.

BROKER NASITS SALES COMPANY
P. O. BOX 121
EL PASO TEXAS

NUMBER OF CASES		PRICE	AMOUNT	NET AMOUNT
290	1/4 OIL KEYLESS SARDINES BANQUET	4.10	1189.00	
10	1/4 MUS KEYLESS SARDINES BANQUET	4.10	41.00	
				1230.00
	DRAFT B/L ATTACHED THRU STATE NATIONAL BANK			
	IN POOL CAR TO R 6016 AMERICAN GROCERY CO. EL PASO TEXAS			
ROUTE	SEAPORT NAVIGATION COMPANY			
PACKER	L. D. CLARK & SON			

A TRUE COPY.
CERTIFIED CORRECT.
MAINE CO-OPERATIVE SARDINE COMPANY
BY E. Plutt, Auditor

We hereby guarantee to the purchaser of the articles of food described in this invoice that they are not adulterated or misbranded within the meaning of the Food and Drugs Act, June 30th, 1906, or any amendments thereof. No claims for credits will be allowed after six months from date of this invoice.

2. 3-25-2000

Customer's Order No. 12/17/25 Our Order No. 6023 Invoice No. 7342

Eastport, Maine, DECEMBER 23 1925

F. S. AINSA COMPANY
EL PASO TEXAS

To Maine Co-operative Sardine Company, Dr.

EASTPORT, MAINE

TERMS: Less 1 1-2 per ct. 10 days from date of invoice
Sales made f. o. b. Eastport District Rate of Freight

BROKER NASITS SALES COMPANY

	NUMBER OF CASES		PRICE	AMOUNT	NET AMOUNT
	100	1/4 OIL KEYLESS SARDINES BANQUET	4.10		410.00
		DRAFT B/L ATTACHED THRU STATE NATIONAL BANK			
		IN POOL CAR TO R 6016 AMERICAN GROCERY COMPANY EL PASO TEXAS			
	ROUTE	SEAPORT NAVIGATION COMPANY			
(h)	PACKER	L. D. CLARK & SON			

A TRUE COPY.
CERTIFIED CORRECT
MAINE CO_OPERATIVE SARDINE COMPANY
BY E. F. Nutt, Secretary

We hereby guarantee to the purchaser of the articles of food described in this invoice that they are not adulterated or misbranded within the meaning of the Food and Drugs Act, June 30th, 1906, or any amendments thereof. No claims for shrinkage will be allowed after six months from date of this invoice.

Form 2. 3-25-2000

108

Customer's Order No. 12/15/25 Our Order No. 6022 Invoice No. 7343

Eastport, Maine, DECEMBER 23 1925

NASITS SALES COMPANY
EL PASO TEXAS

To Maine Co-operative Sardine Company, Dr.

EASTPORT, MAINE

TERMS: Less 1 1-2 per ct. 10 days from date of invoice
Sales made f. o. b. Eastport District Rate of Freight

BROKER NASITS SALES CO.

NUMBER OF CASES		PRICE	AMOUNT	NET AMOUNT
40	1/4 OIL KEYLESS SARDINES BANQUET	4.10	164.00	
20	1/4 OIL KEY DEC. SARDINES BANQUET	4.60	92.00.	
			256.00	
	BROKERAGE ON ENTIRE CAR.....		231.13	24.87
	DRAFT B/L ATTACHED THRU STATE NATIONAL BANK			
	IN POOL CAR TO R 6016			
	AMERICAN GROCERY COMPANY EL PASO TEXAS			
ROUTE	SEAPORT NAVIGATION COMPANY			
PACKER	L. D. CLARK & SON			

A TRUE COPY.
CERTIFIED CORRECT
MAINE CO-OPERATIVE SARDINE COMPANY
BY O. L. Mutty Auditor

We hereby guarantee to the purchaser of the articles of food described in this invoice that they are not adulterated or misbranded within the meaning of the Food and Drugs Act, June 30th, 1906, or any amendments thereof. No claims for swells will be allowed after six months from date of this invoice.

(i)

m 2. 3-25-2000

GALVESTON RAILROAD COMPANY

MARINE DEPARTMENT
No. 8 Beaver St., New York

BILL NO. | DATE 192

ORDER MAINE CO-OPERATIVE SARD CO
ELPASO TEXAS NFY AMERICAN GROC CO
ELPASO TEXAS MALLORY LINE SOU PAC

WICKEN PRO. No. 1117 1/4/26 DGREV2

ROUTE CP ADI JCT NYC WS LTGE FREE

ST ANDREWS NB C994 12/28/25 MCS CO CPR 97212

EASTPORT SEABOARD NAV CO WB 8213 DEC 24 1925

DESCRIPTION OF FREIGHT	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID	TO COLLECT
1125 CS CANNED FISH R 6015 VIZ 1095 CS 1/4 OIL BARQ 20 CS 1/4 DD DD KEIL 10 CS 1/4 MS DD	47310 SNAV CO	398 132	188 29 62 45			

DESTINED ELPASO TEXAS VIA NEW YORK MALLORY SOU PAC

AMERICAN GOODS IN BOND THRU CANADA CLEARED FROM CUSTOMS AT VANCEBORO MAINE

JAN 6 1926

Stowed End Bet Nos

TOTAL

(Y) Stowed #93

80K

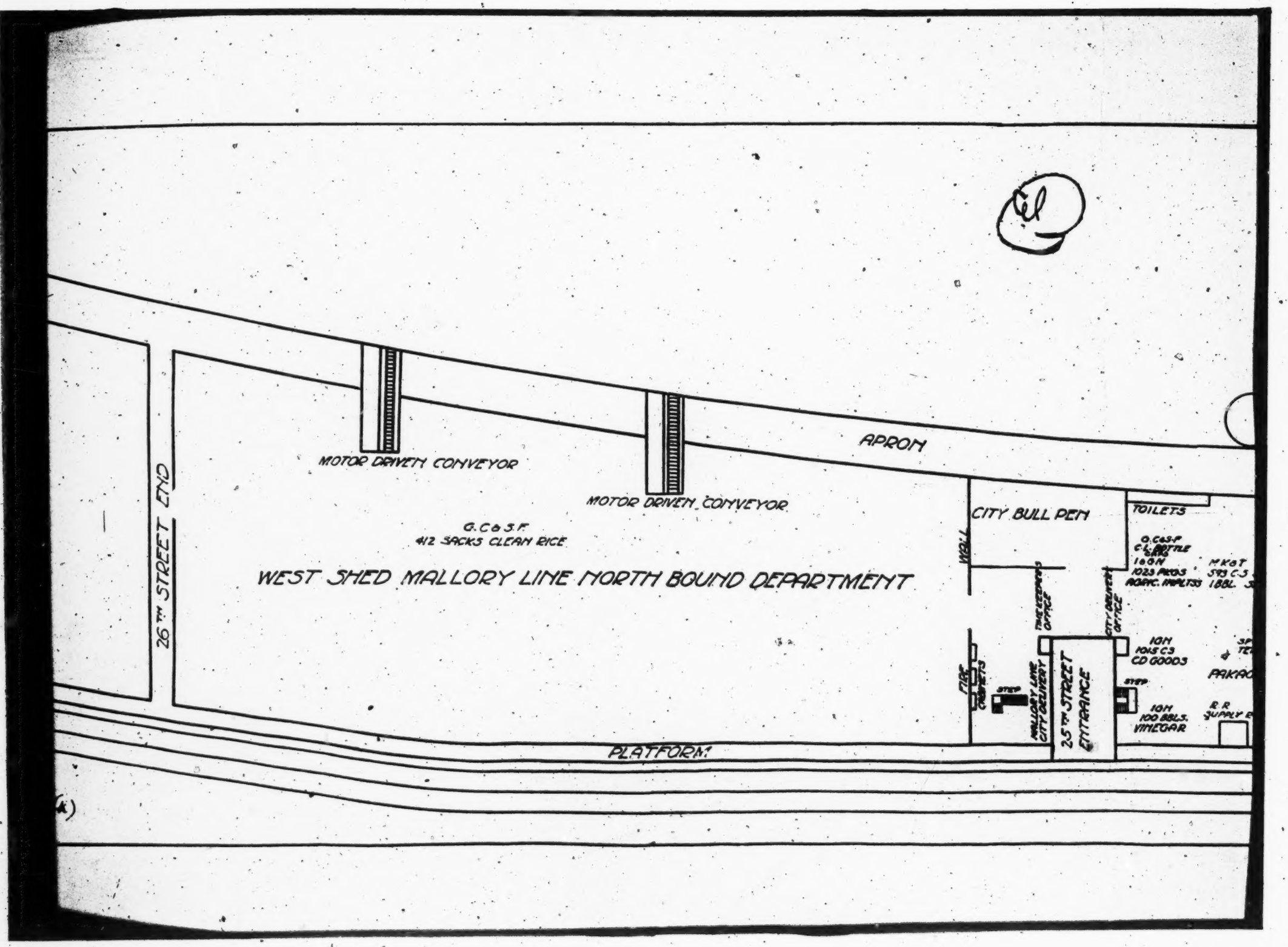
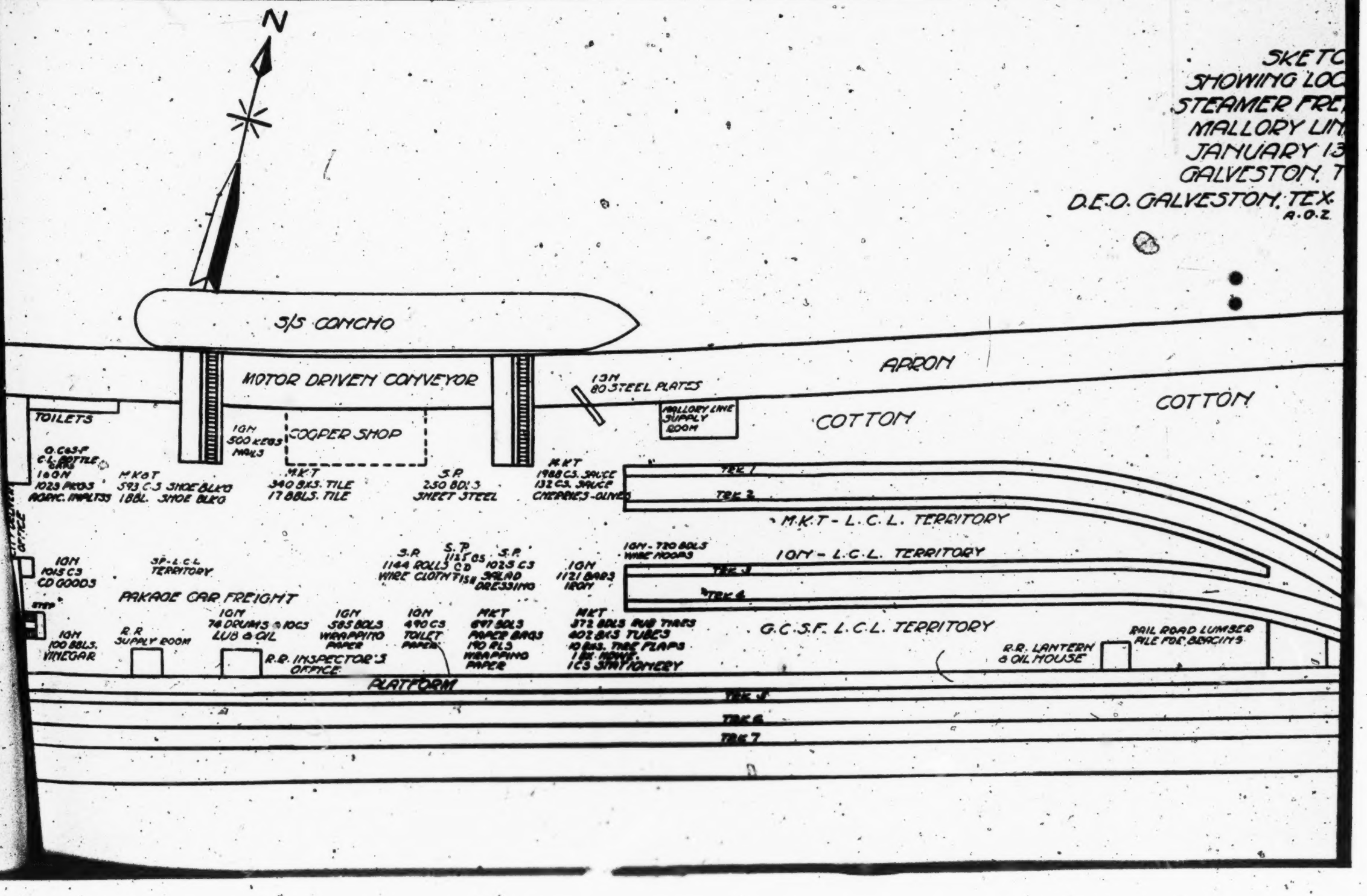

APRON
MOTOR DRIVEN CONVEYOR
MOTOR DRIVEN CONVEYOR
26TH STREET END
G.C & S.F.
412 SACKS CLEAN RICE
WEST SHED MALLORY LINE NORTH BOUND DEPARTMENT
CITY BULL PEN
WALL
TOILETS
TIMEKEEPERS OFFICE
CITY DELIVERY OFFICE
FIRE DOORS
STEP
MALLORY LINE CITY DELIVERY
25TH STREET ENTRANCE
STEP
10M 100 BBLS. VINEGAR
PLATFORM

EXHIBIT B

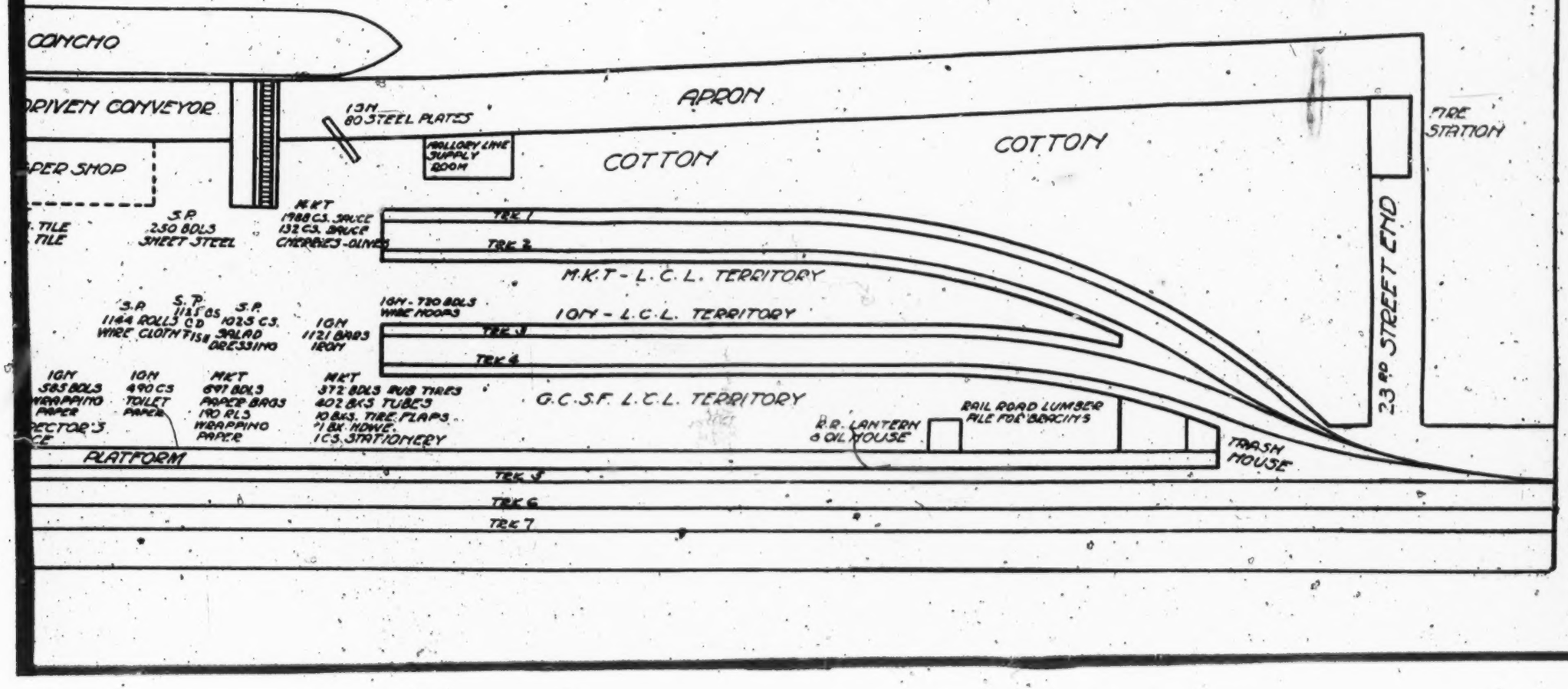


SKETC
SHOWING LOC
STEAMER FRE
MALLORY LIN
JANUARY 13
GALVESTON, T
D.E.O. GALVESTON, TEX.
A.O.Z

96-C

SKETCH SHOWING LOCATION OF STEAMER FREIGHT ON MALLORY LINE DOCK JANUARY 13. 1926 GALVESTON. TEXAS

D.E.O. GALVESTON, TEX. MARCH 3, 1926
A.O.Z.



[fol. 96-d] EXHIBIT "C"

(Copy)

This agreement, made this 1st day of July 1914, between Galveston Wharf Company, a Texas Corporation, having its domicile in Galveston, Texas, hereinafter called the Wharf Company, and Mallory Steamship Company, a Maine Corporation, hereinafter called the Steamship Company:

Witnesseth:

Article I

For and in consideration of the sum of Three Thousand and 00/100 Dollars ($3,000.00) in cash to it in hand paid by the Wharf Company, the receipt of which is hereby fully acknowledged, the Steamship Company has bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the Wharf Company, its successors and assigns, all sheds and warehouses heretofore erected by the Steamship Company, on property belonging to the Wharf Company at Galveston, Texas, and particularly all those sheds and warehouses heretofore erected by said steamship company on what are commonly known as piers Numbers Twenty-three (23) Twenty-four (24), Twenty-five (25) and Twenty-six (26) belonging to the said Wharf Company in the City of Galveston, and all of the right, title and interest of the Steamship Company in and to said Piers, warehouses, and sheds; the Steamship Company, however, excepting and reserving to itself and not conveying hereby, all freight conveyors, mechanical devices, engines, machinery and other equipment heretofore placed, used and provided by the Steamship Company in or upon said sheds, warehouses or piers of the Wharf Company, and it being understood and agreed that the same as well as any and all other property of similar nature as may hereafter be placed in or upon the property and premises of the Wharf Company by the Steamship Company, whether constituting fixtures, or not, shall be and remain the property of the Steamship Company.

[fol. 96-d-1] Article II

The Steamship Company hereby releases and discharges the Wharf Company of and from any and all claims and

demands of every kind and description, which it has, or may have against said Wharf Company, arising at any time prior to the date hereof, due to failure of any railroad company since May 8th, 1911 to pay to the Steamship Company rental for facilities furnished to such railroad company by the Steamship Company.

Article III

It is mutually agreed and understood between the parties that for a period of five (5) years, beginning with the date hereof and ending on the 30th day of June, 1919, the Wharf Company will permit and allow the Steamship Company and its affiliated lines to berth its and their vessels along side of piers numbered Twenty-three (23), Twenty-four (24), Twenty-five (25), Twenty-six (26) and Twenty-seven (27) in the City of Galveston, as now constructed, and to load and unload its and their vessels from and into the sheds and warehouses on said piers and to have the use of all sheds, warehouses and other structures upon or appurtenant to said piers or space and any and all improvements and additions thereto and any others which may be constructed thereon, in consideration of which the Steamship Company obligates itself and agrees to pay to the Wharf Company the sum of Five Thousand and no/100 Dollars ($5000.00) for each of said Five (5) years, said sum to be payable monthly in equal monthly installments on the 1st day of each calendar month, the first of said installments to be payable on August 1st, 1914.

Provided, however, that the right hereby given to the Steamship Company and its affiliated lines during said five (5) year period, is subject to the following provisions, to-wit:

(a) In the event at any time during said period, the [fol. 96-d-2] berthing and shed capacity adjacent to and on said piers Twenty-three (23), Twenty-four (24), Twenty-five (25), Twenty-six (26) and Twenty-seven (27) are not in use to their full capacities by the Steamship Company, or its affiliated lines, the Wharf Company retains and is hereby given the right to permit and allow any other person or corporation to use so much of said berthing and warehouse space as is not in use by the Steamship Company, or its affiliated lines.

(b) It is distinctly agreed and understood that the payment of the said sum of Five Thousand and no/100 Dollars ($5,000.00) per annum hereinabove provided for is to be made as shed hire, and in addition thereto, the Wharf Company shall be entitled to collect from the Steamship Company and the Steamship Company will promptly pay to the Wharf Company the regular wharfage and other rates and charges specified in the tariffs published or hereafter to be published by the Wharf Company for all goods, commodities, wares and freight loaded into or out of vessels of the Steamship Company, or its affiliated lines, which shall berth at said piers, and will comply with all rules shown in such tariffs.

Article IV

The Wharf Company agrees at its own cost and expense, to keep the sheds, warehouses, piers, bulkheads and wharf structures, including water pipes and electric lights, which are the subject of this contract, in good repair and condition during the time that this contract shall be in effect.

Article V

From and after the date hereof all taxes on the property and premises, which are the subject of this contract, shall be paid by the Wharf Company, the Steamship Company to pay, however, to the Wharf Company one-half of the taxes for the year 1914 which the Wharf Company shall pay on [fol. 96-d-3] the sheds and warehouses hereby conveyed by the Steamship Company to the Wharf Company. The insurance on the sheds and warehouses hereby conveyed by the steamship company to the Wharf Company is hereby transferred and assigned by the Steamship Company to the Wharf Company.

Article VI

It is agreed that the Wharf Company shall in no way be responsible for any loss or damage to any goods or cargoes handled over and through said wharves, sheds and warehouses, unless same be caused by defect in roof of warehouses; and that should the Steamship Company allow any of said wharves to be over-loaded at any time so as to cause damage thereto, or to said sheds, the Steamship Company will pay all damages caused thereby and the cost of repairing such wharf or shed.

Article VII

The Steamship Company agrees to pay the salaries of sufficient police watchmen to protect the property hereinabove described, and also its pro-rata of the expense of one day and one night police sergeant.

Article VIII

The Steamship Company agrees to pay for the American District Telegraph system located on the above described property, the police watchmen to report half-hourly by night and hourly by day by means of this system.

Article IX

The Steamship Company agrees that it will forbid the use of kerosene oil for lighting or heating purposes on the wharves or in or about the sheds and warehouses hereinabove described, or in the cargo holds of steamships berthed at said wharves, and will forbid the entrance upon said wharves or to said sheds and warehouses of any gasoline motor propelled vehicle except those of the Galveston Fire Department and the Ambulance of the City of Galveston or of any private hospital.

[fol. 96-d-4] Article X

The Steamship Company agrees to forbid watchmen and all other persons from using lanterns in said sheds and warehouses and on said wharves, in event the same have been or shall be equipped with electric lights. Such electric light shall be installed and maintained by the Wharf Company, but the cost of electrical service shall be paid by the Steamship Company. Unless said sheds and warehouses are or shall be equipped with electric lights the Steamship Company agrees to provide and furnish approved watchman's lanterns for use by the police watchmen.

Article XI

The Steamship Company agrees to forbid the blocking by cotton or merchandise of any signal station, aisle or hydrant, and agrees to provide one water barrel and two water buckets for each Twelve Hundred (1200) square feet of floor space in the above described sheds, and to arrange such barrels in such a way that they may be at all times

available. The Steamship Company further agrees to provide at each hydrant situated inside or adjacent to said property the amount of hose required by the designated representative of Marine Insurance Company. In case the necessary water buckets, barrels and amount of hose is not provided by the Steamship Company within Twelve (12) hours after notification to it by the representative of the Marine Insurance Company, or other proper representatives, the Steamship Company agrees that the Wharf Company shall have authority to provide and install same at the expense of the Steamship Company.

The Steamship Company further agrees that no cotton will be placed on the aprons in the space assigned hereunto except when such cotton is set out for ship's tackle, and all of such cotton shall be removed before dark.

[fol. 96-d-5]

Article XII

This contract and the parties hereto shall be subject to all present and future municipal and port regulations.

Article XIII

After the expiration of the term of Five (5) years hereinabove provided for, the Wharf Company agrees and obligates itself to give to the Steamship Company a preference right for the use of the space hereinabove described under the same terms and conditions as herein specified, provided the business of the Steamship Company and the number of vessels loaded and unloaded at said piers by it and its affiliated lines shall after said five (5) year period continue to justify the Wharf Company in assigning to the Steamship Company so much space, and provided further, that after the expiration of said five year period, the shed hire which shall be paid by the Steamship Company to the Wharf Company (which is hereby fixed at Five Thousand and 00/100 Dollars ($5,000.00) per annum for said Five (5) year period) shall be based upon compensation to the Wharf Company equal in amount to that which shall be paid by other Steamship Lines or agents at the Port of Galveston for space of equal extent, and after the expiration of said five (5) year period, the annual amount to be paid by the Steamship Company to the Wharf Company as such shed hire shall be fixed and determined during each year in

which this contract is in force by amounts paid to the Wharf Company during the same period by other steamship lines and agents for equal space. Such compensation to be paid by the Steamship Company to the Wharf Company to be in addition, however, to all wharfage and other charges provided for in the tariffs filed and hereafter to be filed by the Wharf Company.

Article XIV

After the expiration of the said five year period, this contract shall continue in effect, according to the terms and [fol. 96-d-6] conditions herein specified as long as the business of the Steamship Company, or its affiliated lines at the port of Galveston justifies the same and when such business fails to justify the same, this contract may be terminated by either party by giving to the other party Sixty (60) days written notice of its intention so to terminate it.

Article XV

This agreement shall be binding upon and inure to the benefit of the respective parties, their respective successors and assigns.

In witness whereof the parties hereto have caused this instrument to be executed in duplicate by their respective President and Vice President, hereunto duly authorized, and their corporate seals hereto affixed upon the day and year first above written.

Galveston Wharf Co., by J. Sealy, Its President. Attest: J. J. Davis, Sec. Galveston Wharf Co. Mallory Steamship Co. H. H. Raymond, Its Vice-President. Attest: C. D. Mallory, Sec. Mallory Steamship Co.

(Here follow Exhibits "D" and "E," side folios 96-e-1 to 96-f-1)

EXHIBIT B

EXHIBIT D 96-e-1

Only one Supplement to this Tariff will be in effect at any time.

I. C. C. No. 28
Cancels I. C. C. No. 24

Galveston Wharf Company

Local Tariff No. 18

Cancels

Local Tariff No. 16

NAMING

RATES, RULES AND REGULATIONS

APPLYING ON

Interstate and Foreign Freight Traffic

BETWEEN

Points on Galveston Wharf Company

AND

Its Junctions with Connecting Lines as shown on Page 4

ALSO RATES AND RULES GOVERNING

Wharfage, Loading and Unloading Cars, Weighing Cars, and Handling Traffic between Wharves, Piers, Industries and Public Tracks Served by the Galveston Wharf Co.

Issued SEPTEMBER 10, 1923 **Effective OCTOBER 15, 1923**

JOHN SEALY
President

GEORGE SEALY
Vice President

Issued by
E. E. GOSSRAU,
General Manager
GALVESTON, TEXAS

(D)

Fred F. Hunter, Printer

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Section 1

Rules and Regulations Governing the Handling of Traffic over the Railroad of the Galveston Wharf Company.

List of Wharves, Industries and Public Delivery Tracks from and to Which Rates Apply.

Item No. 1

INDUSTRY	LOCATION
A	
Allen, T. B. & Co.....Stave Yard	19th St. & Ave. A
B	
Black Hdwe Co., Warehouse	33nd St. & Wharf.
C	
Cities Service Oil Co. of Texas.....	41st St. & Wharf.
Cotton Conc'n Co., Wareh'e Nos. 1 & 3	36th St. & Wharf.
Cotton Concentration Co. W. H. No 2	33nd St. & Wharf.
Creosote Storage Tanks	34th St. & Ave. A
E	
Elevator "A"	14th St. & Wharf
Elevator "B"	29th St. & Wharf
F	
Freeport Sulphur Co.	14th St. & Wharf.
G	
Galveston Barrel Factory	Mitchell Spur
Galveston Coal Co.	34th St. & Wharf.
Galveston Warehouse Co.	17th St. & Ave. A.
Galveston Wharf Company's Sacking Elevator	27th St. & Wharf
Galveston Wharf Company's Material Yard	31st St. & Wharf
Guisti, D., Wood Yard	10th St. & Ave. A.
Gulf, Colorado & Santa Fe Creosote Tanks	34th St. & Wharf
Gulf Fisheries Company	22nd St. & Wharf
Gulf Fisheries Oil Tank	22nd St. & Wharf
Gulf Pipe Line Co.	38th and 39th Sts. and Wharf
Gulf Refining Co., Warehouse	18th St. & Ave. A.
H	
Haden & Co., W. D.....Shell Track	19th St. & Wharf
Haden & Co., W. D.....Shell Track	14th St. & Wharf
Henckels Fruit & Produce Co.....	Mitchell Spur
Hoecker & George .....Warehouse	18th St. & Ave. A
Hughes & Co., R. M.....Warehouse	Mitchell Spur
Humble Oil & Refining Co.	14th St. & Ave. A.
Hunter, Thos. A., Wood Yard.....	13th St. & Ave. A.
I	
International Creosoting Co. Tanks.	34th St. & Ave. A
International Creosoting Co. Works.	34th St. & Wharf
K	
Kelso, W. A. ..... Material Yard	23rd St. & Wharf.
M	
Magnolia Petroleum Co., Load'g Rks.	37th St. & Wharf.
Magnolia Petroleum Co., Warehouse.	12th St. & Ave. A
Merchants Fruit Co.	20th St. & Ave. A
Merchants & Planters Compress Co.	48th St. & Ave. E
Missouri, Kansas & Texas Ry. Co. .....Creosote Tanks	34th St. & Wharf
Moody Compress and Warehouse Co.	48th & 50th Sts & Ave. E
N	
New Orleans Export Co.	38th St. & Wharf
P	
Pier 10	Foot of 10th St.
Pier 11	Foot of 11th St.
Pier 12	Foot of 12th St.
Pier 14	Foot of 14th St.
Pier 15	Foot of 15th St.

INDUSTRY	LOCATION
P	
Pier 16	Foot of 16th St.
Pier 17	Foot of 17th St.
Pier 18	Foot of 18th St.
Pier 19	Foot of 19th St.
Pier 20	Foot of 20th St.
Pier 21	Foot of 21st St.
Pier 22	Foot of 22nd St.
Pier 23	Foot of 23rd St.
Pier 24	Foot of 24th St.
Pier 25	Foot of 25th St.
Pier 26	Foot of 26th St.
Pier 27	Foot of 27th St.
Pier 28	Foot of 28th St.
Pier 29	Foot of 29th St.
Pier 30	Foot of 30th St.
Pier 31	Foot of 31st St.
Pier 32	Foot of 32nd St.
Pier 33	Foot of 33rd St.
Pier 34	Foot of 34th St.
Pier 35	Foot of 35th St.
Pier 36	Foot of 36th St.
Pier 37	Foot of 37th St.
Pier 38	Foot of 38th St.
Pier 39	Foot of 39th St.
Pier 40	Foot of 40th St.
Pier 41	Foot of 41st St.
Parr, Wm. & Co.....Warehouse	18th St. & Wharf
Public Delivery Tr'k Elevator Switch	21st to 23rd St. and Wharf
Public Delivery Track..Rock Switch	20th St. & Wharf
Public Delivery Track	9th St. & Ave A
Public Delivery Track	12th St. & Ave. A
Public Delivery Track	14th St. & Ave. A
Public Delivery Track	18th St. & Ave. A
S	
Shipside Density Comp. Co., Compress	10th St. & Wharf
Shipside Density Comp. Co., Compress	29th St. & Wharf
Shipside Density Comp. Co., Compress	33rd St. & Wharf
Shipside Density Comp. Co., Compress	36th St. & Wharf
Shipside Density Comp. Co., Compress	39th St. & Wharf
Shipside Density Comp. Co. Compress	40th St. & Wharf
Stock Pens	27th St. & Wharf
Standard American Dredging Co. ...	13th St. & Wharf.
Suderman & Young, Shell Plant.....	13th St. & Wharf.
T	
Texas Gulf Sulphur Co.	35th St. & Wharf.
Texas Sheet Metal Works	11th St. & Ave. A.
Texas Star Flour Mills	20th St. & Ave. A
The Texas Company	Mitchell Spur
W.	
Weber, F. D., Shell Plant	22nd St. & Wharf.
Werner, L., Stave Co., Stave Yard...	10th St. & Wharf.
Wilkens & Biehl.....Shell Crushers	Mitchell Spur.

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Railways Connecting with the Galveston Wharf Company.

Item No. 4.

Galveston, Houston & Henderson Ry. Co.
Galveston, Harrisburg & San Antonio Ry. Co.
Galveston & Western Ry.
Gulf, Colorado & Santa Fe Ry. Co.
International-Great Northern R. R. Co.
Missouri-Kansas-Texas R. R. Co. of Texas
Southern Pacific Terminal Ry. Co.

Application of Rates.

Item No. 6.

A. The rates and rules provided herein apply only on Interstate and Foreign Traffic handled by the Galveston Wharf Company between points on its tracks, or received from, or delivered to its connections.

B. Rates named in Items Nos. 40 to 58, inclusive, apply on all cars handled regardless of tonnage and cover the movement of loaded car one way and return of the empty, or the placing of empty cars and their return under load. If loaded in both directions regular rates will apply on each movement.

C. Under the rates named in Items Nos. 40, 42, 48, and 50, the Railroad Company from which freight is received, or to which freight is delivered, shall be liable for all loss or damage occurring to freight on lines of this Company, other than through the negligence of this Company, and this Company will not be liable for any injury to cars while in its possession, except through its own negligence.

D. Rates named in Items Nos. 66 to 550 and 588 to 1040 apply on the specific commodities shown and cannot be applied to analogous articles.

(Authority Rule 6 B, I. C. C. Tariff Cir. 18-A.)

Item No. 8.

When two or more articles, having different loading or unloading rates, are handled in mixed car loads, the charge on the total weight of the mixed shipment will be the carload rate applicable to the article taking the highest carload rating except where there is a minimum carload or more of one commodity in the shipment, in which event charges will be assessed on basis of the rate and minimum weight applicable to the carload commodity plus charges on other commodities at actual weight and less carload rates.

86D

96-e-5

Supplement No. 7 contains all changes from original Tariff that are in effect on the date hereof.

Supplement No. 7
To I. C. C. No. 38
Cancels Supplement No. 6

Galveston Wharf Company

SUPPLEMENT No. 7
Cancels Supplement No. 6

TO

Local Tariff No. 18

NAMING

RATES, RULES AND REGULATIONS

APPLYING ON

Interstate and Foreign Freight Traffic

BETWEEN

Points on Galveston Wharf Company

AND

Its Junctions with Connecting Lines as shown on Page 4

ALSO RATES AND RULES GOVERNING

Wharfage, Loading and Unloading Cars, Weighing Cars, and Handling Traffic between Wharves, Piers, Industries and Public Tracks Served by the Galveston Wharf Co.

Issued FEBRUARY 5, 1927

Effective MARCH 15, 1927
Except as Noted in Individual Items.

GEORGE SEALY
President

R. WAVERLEY SMITH
Vice President

Issued by
E. E. GOSSRAU,
General Manager
GALVESTON, TEXAS

(n)

Fred F. Hunter, Printer

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Section 1
Rules and Regulations

Item No.	Subject	RULES
391/2A Cancels 391/2	Shed Hire Charges on Cotton, Cotton Seed Cake and Cotton Seed Meal	**Reissue: Effective September 15, 1926, in Supplement No. 5.** (A) Shed Hire charges on cotton placed in shedded piers or wharves awaiting shipment, will be made as follows: First 15 days free. For each additional 1 day or fractional part thereof, 1 cent per square bale. Charges against Round Bale Cotton will be One-Half of the above. (B) Shed hire charges on cotton seed cake and cotton seed meal placed in shedded piers or wharves awaiting shipment will be made as follows: First 15 days free. Next 7 days or fractional part thereof, 10 cents per net ton. For next 7 days or fractional part thereof, 10 cents per net ton. For each additional 7 days or fractional part thereof, 5 cents per net ton. (C) This Company does not engage in the business of storage or warehousing of property on its Wharves or Piers and will not be responsible for loss or damage to property remaining thereon. All property landed or received on any of its Wharves or Piers is thereafter at the risk of the owner and this Company reserves the right to remove any or all such property to any part of the wharves at its convenience and at the risk and expense of the owners, or it may be removed and stored elsewhere than on the Wharves or Piers without notice and at the risk and expense of the owner, and this Company will retain legal possession of all property so removed until all charges are paid.

Section 2
Loading and Unloading Charges on Export, Import and Coastwise Traffic

Item No.	COMMODITY	RATE
194	**Reissue: Effective September 15, 1926, in Supplement No. 5.** Cotton Linters, Cotton Seed Hull Fibre Shavings, or Second Cut Linters	Per bale, 5½ cents.
379	**Reissue: Effective January 11, 1927, in Supplement No. 6.** Rice, Brewers', Rice Bran and Rice Polish	Per 100 lbs., 1½ cents.
479	**Reissue: Effective September 15, 1926, in Supplement No. 5.** Sulphur, in sacks	Per 100 lbs., 1½ cents.

Section 3
Rates and Rules Governing the Handling of Traffic Over the Wharves and Piers of the Galveston Wharf Company.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Coastwise Traffic, Inbound or Outbound, Between Atlantic Seaboard and Gulf Points Only, and Galveston, Texas.

Item No.	COMMODITY	RATE
589	**Reissue: Effective February 6, 1926, in Supplement No. 4.** Brick, common and paving	37½ cents per 1,000.
593B Cancels 593A	**Reissue: Effective January 11, 1927, in Supplement No. 6.** Sulphur, in bulk, gross ton 2240 lbs.	Per ton, 12½ cents.
594B Cancels 594A	**Reissue: Effective January 11, 1927, in Supplement No. 6.** Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.	Per ton, 12½ cents.

Reissue: Effective October 15, 1923, in Supplement No. 1.

Correction in Headings, Page 12, Tariff No. 18, I. C. C. No. 28, Covering Wharfage on Import and Coastwise Traffic, Inward and Outward, To Read:

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Import and Coastwise Traffic Inward, except as provided for under Items 588, 590, 592, 593 and 594.

Reissue: Effective October 15, 1928, in Supplement No. 1

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Export and Coastwise Traffic Outward, except as provided for under Items, 588, 590, 592, 593 and 594.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Import and Coastwise Traffic Inward, except as provided for under Items 588, 590, 593 and 594.

Item No.	COMMODITY	RATE
617A Cancels 617	(R) Coal	1
694B Cancels 694A	**Reissue: Effective January 11, 1927, in Supplement No. 6.** Sulphur, in bulk, gross ton 2240 lbs.	Per ton, 12½ cents.
695B Cancels 695A	**Reissue: Effective January 11, 1927, in Supplement No. 6.** Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.	Per ton, 12½ cents.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Export and Coastwise Traffic Outward, except as provided for under Items 588, 589, 590, 592, 593A and 594A.

Item No.	COMMODITY	RATE
747	**Reissue: Effective September 30, 1925, in Supplement No. 3.** Bagging for Baling Cotton, in rolls or bales	1¼
767A Cancels 767	(R) Coal, except as otherwise provided in Item No. 565	1
788	**Reissue: Effective September 30, 1925, in Supplement No. 3.** Cotton Bale Ties, in bundles	1¼
917	**Reissue: Effective September 30, 1925, in Supplement No. 3.** Oil, Kerosene, in bulk, loaded direct from tank car to vessels, per unit 50 gallons	2
920A Cancels 920	**Reissue: Effective February 15, 1924, in Supplement No. 2.** Oil, Refined Petroleum, in packages	1½
927A Cancels 927	**Reissue: Effective February 15, 1924, in Supplement No. 2.** Ore and Bullion, viz: Copper, Iron, Lead, Manganese, Spelter, Zinc and Concentrates	1¼
994B Cancels 994A	**Reissue: Effective January 11, 1927, in Supplement No. 6.** Sulphur, in bulk, gross ton 2240 lbs.	Per ton, 12½ cents.
995B Cancels 995A	**Reissue: Effective January 11, 1927, in Supplement No. 6.** Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.	Per ton, 12½ cents.

(R) Denotes reduction in rate.

(O)

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Supplement No. 5
To L. C. C. No. 18
Cancels Supplement No. 4

Galveston Wharf Company

SUPPLEMENT No. 5
Cancels Supplement No. 4

TO

Local Tariff No. 18

NAMING

RATES, RULES AND REGULATIONS

APPLYING ON

Interstate and Foreign Freight Traffic

BETWEEN

Points on Galveston Wharf Company

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Its Junctions with Connecting Lines as shown on Page 4

ALSO RATES AND RULES GOVERNING

Wharfage, Loading and Unloading Cars, Weighing Cars, and Handling Traffic between Wharves, Piers, Industries and Public Tracks Served by the Galveston Wharf Co.

Issued AUGUST 19, 1926

Effective SEPTEMBER 15, 1926
Except as Noted in Individual Items.

GEORGE SEALY
President

R. WAVERLEY SMITH
Vice President

Issued by
E. E. GOSSRAU,
General Manager
GALVESTON, TEXAS

(P)

Fred. P. Hunter, Printer

Section 1
Rules and Regulations

Item No.	Subject	RULES
39½A Cancels 39½	Shed Hire Charges on Cotton, Cotton Seed Cake and Cotton Seed Meal	*(A) Shed Hire charges on cotton placed in shedded piers or wharves awaiting shipment, will be made as follows: First 15 days free. For each additional 1 day or fractional part thereof, 1 cent per square bale. Charges against Round Bale Cotton will be One-Half of the above. *(B) Shed hire charges on cotton seed cake and cotton seed meal placed in shedded piers or wharves awaiting shipment will be made as follows: First 15 days free. Next 7 days or fractional part thereof, 10 cents per net ton. For next 7 days or fractional part thereof, 10 cents per net ton. For each additional 7 days or fractional part thereof, 5 cents per net ton. *(C) This Company does not engage in the business of storage or warehousing of property on its Wharves or Piers and will not be responsible for loss or damage to property remaining thereon. All property landed or received on any of its Wharves or Piers is thereafter at the risk of the owner and this Company reserves the right to remove any or all such property to any part of the wharves at its convenience and at the risk and expense of the owners, or it may be removed and stored elsewhere than on the Wharves or Piers without notice and at the risk and expense of the owner, and this Company will retain legal possession of all property so removed until all charges are paid.

* Denotes advance in rate.
• Indicates change other than advance or reduction.

Section 2
Loading and Unloading Charges on Export, Import and Coastwise Traffic

Item No.	COMMODITY	RATE
(R) 194	Cotton Linters, Cotton Seed Hull Fibre Shavings, or Second Cut Linters	Per bale, 5½ cents.
(R) 479	Sulphur, in sacks	Per 100 lbs., 1½ cents.

(R) Denotes reduction in rate.

Section 3
Rates and Rules Governing the Handling of Traffic Over the Wharves and Piers of the Galveston Wharf Company.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Coastwise Traffic, Inbound or Outbound, Between Atlantic Seaboard and Gulf Points Only, and Galveston, Texas.

Item No.	COMMODITY	RATE
589	Reissue: Effective February 6, 1926, in Supplement No. 4. Brick, common and paving	37½ cents per 1,000.
593A Cancels 593	Reissue: Effective February 15, 1924, in Supplement No. 2. Sulphur, in bulk, gross ton 2240 lbs.	Per ton, 15 cents.
594A Cancels 594	Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.	Per ton, 15 cents.

Reissue: Effective October 15, 1923, in Supplement No. 1.

Correction in Headings, Page 12, Tariff No. 18, I. C. C. No. 28, Covering Wharfage on Import and Coastwise Traffic, Inward and Outward, To Read:

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Import and Coastwise Traffic Inward, except as provided for under Items 588, 590, 592, 593 and 594.

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Wharfage Rates Continued

Reissue: Effective October 15, 1923, in Supplement No. 1

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED. Applying on Export and Coastwise Traffic Outward, except as provided for under Items, 588, 590, 592, 593 and 594.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED. Applying on Import and Coastwise Traffic Inward, except as provided for under Items 588, 590, 592 and 594.

Item No.	COMMODITY	RATE
694A Cancels 694	**Reissue: Effective February 15, 1924, in Supplement No. 2.**	
695A Cancels 695	Sulphur, in bulk, gross ton 2240 lbs.	Per ton, 15 cents.
	Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.	Per ton, 15 cents.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED. Applying on Export and Coastwise Traffic Outward, except as provided for under Items 588, 589, 590, 592, 593A and 594A.

Item No.	COMMODITY	RATE
747	**Reissue: Effective September 30, 1925, in Supplement No. 3.** Bagging for Baling Cotton, in rolls or bales	1¼
782	**Reissue: Effective September 30, 1925, in Supplement No. 3.** Cotton Bale Ties, in bundles	1¼
917	**Reissue: Effective September 30, 1925, in Supplement No. 3.** Oil, Kerosene, in bulk, loaded direct from tank car to vessels, per unit 50 gallons	2
920A Cancels 920	**Reissue: Effective February 15, 1924, in Supplement No. 2.** Oil, Refined Petroleum, in packages	1½
927A Cancels 927	**Reissue: Effective February 15, 1924, in Supplement No. 2.** Ore and Bullion, viz: Copper, Iron, Lead, Manganese, Spelter, Zinc and Concentrates	1¼
994A Cancels 994	**Reissue: Effective February 15, 1924, in Supplement No. 2.**	
996A Cancels 996	Sulphur, in bulk, gross ton 2240 lbs.	Per ton, 15 cents.
	Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.	Per ton, 15 cents.

(g)

96-e-11

Supplement No. 4 cancels all changes from original Tariff that are in effect on the date hereof.

Supplement No. 4
To I. C. C. No. 28
Cancels Supplement No. 3

Galveston Wharf Company

SUPPLEMENT No. 4
Cancels Supplement No. 3

TO

Local Tariff No. 18

NAMING

RATES, RULES AND REGULATIONS

APPLYING ON

Interstate and Foreign Freight Traffic

BETWEEN

Points on Galveston Wharf Company

AND

Its Junctions with Connecting Lines as shown on Page 4

ALSO RATES AND RULES GOVERNING

Wharfage, Loading and Unloading Cars, Weighing Cars, and Handling Traffic between Wharves, Piers, Industries and Public Tracks Served by the Galveston Wharf Co.

Issued JANUARY 2, 1926

Effective FEBRUARY 6, 1926
Except as Noted in Individual Items.

JOHN SEALY
President

GEORGE SEALY
Vice President

Issued by
E. E. GOSSRAU,
General Manager
GALVESTON, TEXAS

(R)

Fred F. Hunter, Printer

868K

Section 3

Rates and Rules Governing the Handling of Traffic Over the Wharves and Piers of the Galveston Wharf Company.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Coastwise Traffic, Inbound or Outbound, Between Atlantic Seaboard and Gulf Points Only, and Galveston, Texas.

Item No.	COMMODITY	RATE
589	(R) Brick, common and paving	37½ cents per 1,000.
593A Cancels 593	**Reissue: Effective February 15, 1924, in Supplement No. 2.** Sulphur, in bulk, gross ton 2240 lbs.	Per ton, 15 cents.
594A Cancels 594	Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.	Per ton, 15 cents.

Reissue: Effective October 15, 1923, in Supplement No. 1.

Correction in Headings; Page 12, Tariff No. 18, I. C. C. No. 28, Covering Wharfage on Import and Coastwise Traffic, Inward and Outward, To Read:

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Import and Coastwise Traffic Inward, except as provided for under Items 588, 590, 592, 593 and 594.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Export and Coastwise Traffic Outward, except as provided for under Items, 588, 590, 592, 593 and 594.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Import and Coastwise Traffic Inward, except as provided for under Items 588, 590, 593 and 594.

Item No.	COMMODITY	RATE
594A Cancels 594	**Reissue: Effective February 15, 1924, in Supplement No. 2.** Sulphur, in bulk, gross ton 2240 lbs.	Per ton, 15 cents.
595A Cancels 595	Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.	Per ton, 15 cents.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Export and Coastwise Traffic Outward, except as provided for under Items 588, 590, 592, 593 and 594.

Item No.	COMMODITY	RATE
747	**Reissue: Effective September 20, 1923, in Supplement No. 3.** Bagging for Baling Cotton, in rolls or bales	1¼
782	**Reissue: Effective September 20, 1923, in Supplement No. 3.** Cotton Bale Ties, in bundles	1¼
917	**Reissue: Effective September 20, 1923, in Supplement No. 3.** Oil, Kerosene, in bulk, loaded direct from tank car to vessels, per unit 50 gallons	2
930A Cancels 930	**Reissue: Effective February 15, 1924, in Supplement No. 2.** Oil, Refined Petroleum, in packages	1½
937A Cancels 937	**Reissue: Effective February 15, 1924, in Supplement No. 2.** Ore and Bullion, viz: Copper, Iron, Lead, Manganese, Spelter, Zinc and Concentrates	1¼
594A Cancels 594	**Reissue: Effective February 15, 1924, in Supplement No. 2.** Sulphur, in bulk, gross ton 2240 lbs.	Per ton, 15 cents.
595A Cancels 595	Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.	Per ton, 15 cents.

(R) Denotes Reduction in Rate.

96-e-13

Supplement No. 4 contains all changes from original Tariff that are in effect on the date hereof.

Supplement No. 4
To I. C. C. No. 18
Cancels Supplement No. 3

Galveston Wharf Company

SUPPLEMENT No. 4
Cancels Supplement No. 3

TO

Local Tariff No. 18

NAMING

RATES, RULES AND REGULATIONS

APPLYING ON

Interstate and Foreign Freight Traffic

BETWEEN

Points on Galveston Wharf Company

AND

Its Junctions with Connecting Lines as shown on Page 4

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Wharfage, Loading and Unloading Cars, Weighing Cars, and Handling Traffic between Wharves, Piers, Industries and Public Tracks Served by the Galveston Wharf Co.

Issued JANUARY 2, 1926

Effective FEBRUARY 6, 1926
Except as Noted in Individual Items.

JOHN SEALY
President

GEORGE SEALY
Vice President

Issued by
E. E. GOSSRAU,
General Manager
GALVESTON, TEXAS

(8)

Fred P. Hunter, Printer

86M

Section 3

Rates and Rules Governing the Handling of Traffic Over the Wharves and Piers of the Galveston Wharf Company.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Coastwise Traffic, Inbound or Outbound, Between Atlantic Seaboard and Gulf Points Only, and Galveston, Texas.

Item No.	COMMODITY	RATE
589	(R) Brick, common and paving	37½ cents per 1,000.
593A Cancels 593	**Reissue: Effective February 15, 1924, in Supplement No. 2.** [illegible]ar, in bulk, gross ton 2240 lbs.	Per ton, 15 cents.
594A Cancels 594	[illegible]ur, in boxes, barrels or sacks, gross ton 2240 lbs.	Per ton, 15 cents.

Reissue: Effective October 15, 1923, in Supplement No. 1.

Correction in Headings, Page 12, Tariff No. 18, I. C. C. No. 28, Covering Wharfage on Import and Coastwise Traffic, Inward and Outward, To Read:

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Import and Coastwise Traffic Inward, except as provided for under Items 588, 590, 592, 593 and 594.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Export and Coastwise Traffic Outward, except as provided for under Items, 588, 590, 592, 593 and 594.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Import and Coastwise Traffic Inward, except as provided for under Items 588, 590, 593 and 594.

Item No.	COMMODITY	RATE
694A Cancels 694	**Reissue: Effective February 15, 1924, in Supplement No. 2.** Sulphur, in bulk, gross ton 2240 lbs.	Per ton, 15 cents.
695A Cancels 695	Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.	Per ton, 15 cents.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Export and Coastwise Traffic Outward, except as provided for under Items 588, 590, 592, 593 and 594.

Item No.	COMMODITY	RATE
747	**Reissue: Effective September 30, 1925, in Supplement No. 3.** Bagging for Baling Cotton, in rolls or bales	1¼
783	**Reissue: Effective September 30, 1925, in Supplement No. 3.** Cotton Bale Ties, in bundles	1¼
917	**Reissue: Effective September 30, 1925, in Supplement No. 3.** Oil, Kerosene, in bulk, loaded direct from tank car to vessels, per unit 50 gallons	3
920A Cancels 920	**Reissue: Effective February 15, 1924, in Supplement No. 2.** Oil, Refined Petroleum, in packages	1¼
927A Cancels 927	**Reissue: Effective February 15, 1924, in Supplement No. 2.** Ore and Bullion, viz: Copper, Iron, Lead, Manganese, Spelter, Zinc and Concentrates	1¼
994A Cancels 994	**Reissue: Effective February 15, 1924, in Supplement No. 2.** Sulphur, in bulk, gross ton 2240 lbs.	Per ton, 15 cents.
995A Cancels 995	Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.	Per ton, 15 cents.

(R) Denotes Reduction in Rate.

Supplement No. 2 contains all changes from original Tariff that are in effect on the date hereof.

Supplement No. 2
To I. C. C. No. 18
Cancels Supplement No. 1

Galveston Wharf Company

SUPPLEMENT No. 2
Cancels Supplement No. 1

TO

Local Tariff No. 18

NAMING

RATES, RULES AND REGULATIONS

APPLYING ON

Interstate and Foreign Freight Traffic

BETWEEN

Points on Galveston Wharf Company

AND

Its Junctions with Connecting Lines as shown on Page 4

ALSO RATES AND RULES GOVERNING

Wharfage, Loading and Unloading Cars, Weighing Cars, and Handling Traffic between Wharves, Piers, Industries and Public Tracks Served by the Galveston Wharf Co.

Issued JANUARY 10, 1924

Effective FEBRUARY 15, 1924
Except as Noted in Individual Items.

JOHN SEALY
President

GEORGE SEALY
Vice President

Issued by
E. E. GOSSRAU,
General Manager
GALVESTON, TEXAS

(+)

Fred P. Hunter, Printer

860

Section 3

Rates and Rules Governing the Handling of Traffic Over the Wharves and Piers of the Galveston Wharf Company.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Coastwise Traffic, Inbound or Outbound, Between Atlantic Seaboard and Gulf Points Only, and Galveston, Texas.

Item No.	COMMODITY	RATE
593A Cancels 593 594A Cancels 594	(R) Sulphur, in bulk, gross ton 2240 lbs. ..... (R) Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.....	Per ton, 15 cents. Per ton, 15 cents.

(R) Denotes Reduction in Rate.

Reissue: Effective October 15, 1923, in Supplement No. 1.

Correction in Headings, Page 12, Tariff No. 18, I. C. C. No. 28, Covering Wharfage on Import and Coastwise Traffic, Inward and Outward, To Read:

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Import and Coastwise Traffic Inward, except as provided for under Items 588, 590, 592, 593 and 594.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Export and Coastwise Traffic Outward, except as provided for under Items, 588, 590, 592, 593 and 594.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Import and Coastwise Traffic Inward, except as provided for under Items 588, 590, 593 and 594.

Item No.	COMMODITY	RATE
594A Cancels 594 595A Cancels 595	(R) Sulphur, in bulk, gross ton 2240 lbs..... (R) Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.....	Per ton, 15 cents. Per ton, 15 cents.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Export and Coastwise Traffic Outward, except as provided for under Items 588, 590, 592, 593 and 594.

Item No.	COMMODITY	RATE
589A Cancels 589	(R) Oil, Refined Petroleum, in packages.....	1½
987A Cancels 987	Ore and Bullion, viz: Copper, Iron, Lead, Manganese, Spelter, Zinc and (R) Concentrates.....	1¼
594A Cancels 594 596A Cancels 596	(R) Sulphur, in bulk, gross ton 2240 lbs..... (R) Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.....	Per ton, 15 cents. Per ton, 15 cents.

(R) Denotes Reduction in Rate.

Supplement No. 2 contains all changes from original Tariff that are in effect on the date hereof.

Supplement No. 2
To I. C. C. No. 18
Cancels Supplement No. 1

Galveston Wharf Company

SUPPLEMENT No. 2
Cancels Supplement No. 1

TO

Local Tariff No. 18

NAMING

RATES, RULES AND REGULATIONS

APPLYING ON

Interstate and Foreign Freight Traffic

BETWEEN

Points on Galveston Wharf Company

AND

Its Junctions with Connecting Lines as shown on Page 4

ALSO RATES AND RULES GOVERNING

Wharfage, Loading and Unloading Cars, Weighing Cars, and Handling Traffic between Wharves, Piers, Industries and Public Tracks Served by the Galveston Wharf Co.

Issued JANUARY 10, 1924

Effective FEBRUARY 15, 1924
Except as Noted in Individual Items.

JOHN SEALY
President

GEORGE SEALY
Vice President

Issued by
E. E. GOSSRAU,
General Manager
GALVESTON, TEXAS

(W)

Fred F. Hunter, Printer

860

Section 3

Rates and Rules Governing the Handling of Traffic Over the Wharves and Piers of the Galveston Wharf Company.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Coastwise Traffic, Inbound or Outbound, Between Atlantic Seaboard and Gulf Points Only, and Galveston, Texas.

Item No.	COMMODITY	RATE
593A Cancels 593	(R) Sulphur, in bulk, gross ton 2240 lbs.	Per ton, 15 cents.
594A Cancels 594	(R) Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.....	Per ton, 15 cents.

(R) Denotes Reduction in Rate.

Reissue: Effective October 15, 1923, in Supplement No. 1.

Correction in Headings, Page 12, Tariff No. 18, I. C. C. No. 28, Covering Wharfage on Import and Coastwise Traffic, Inward and Outward, To Read:

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Import and Coastwise Traffic Inward, except as provided for under Items 588, 590, 592, 593 and 594.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Export and Coastwise Traffic Outward, except as provided for under Items, 588, 590, 592, 593 and 594.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Import and Coastwise Traffic Inward, except as provided for under Items 588, 590, 593 and 594.

Item No.	COMMODITY	RATE
594A Cancels 594	(R) Sulphur, in bulk, gross ton 2240 lbs.....	Per ton, 15 cents.
596A Cancels 596	(R) Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.....	Per ton, 15 cents.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Export and Coastwise Traffic Outward, except as provided for under Items 588, 590, 592, 593 and 594.

Item No.	COMMODITY	RATE
230A Cancels 230	(R) Oil, Refined Petroleum, in packages.....	1½
237A Cancels 237	Ore and Bullion, viz: Copper, Iron, Lead, Manganese, Spelter, Zinc and (R) Concentrates.....	1¼
594A Cancels 594	(R) Sulphur, in bulk, gross ton 2240 lbs.....	Per ton, 15 cents.
596A Cancels 596	(R) Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.....	Per ton, 15 cents.

(R) Denotes Reduction in Rate.

Rules and Regulations.

Item No.	SUBJECT	RULES
10	Orders for Empty Cars	Orders for empty cars for loading must be placed with the car service department of this Company. Empty cars will not be accepted from connecting lines, except upon orders placed by this Company.
12	Carding Cars	A. Cars will be handled in accordance with instructions shown on cards and when carded for points shown in Item No. 1, will be handled direct to such points. B. Cards attached to loaded cars should show contents, consignee and point of delivery. Those attached to empty cars should show commodity, by whom and at what point cars are to be loaded, also this Company's order number. Cars not properly carded cannot be accepted.
14	Billing Cars	All cars delivered this Company must be accompanied by billing or transfer sheet showing the same information called for in Item No. 12, and in addition thereto the car numbers and initials.
16	Classification of Cars by Piers	A. All Cars delivered to this Company for handling to Piers at the rates named herein must be classified and delivered in Pier lots, designating on cards the Pier and berth to which the freight is to be delivered, placing together all cars going to each Pier. Such deliveries to be made on receiving tracks to be designated by this Company. B. Cars delivered to connecting lines by the Galveston Wharf Company at the rates named herein will be delivered at such points, within switching limits, as may be designated by receiving line, loaded cars to be switched separately from empty cars in each train.
18	Over or Improperly Loaded Cars	Cars offered for movement under this Tariff must be loaded in accordance with Rules and Specifications of the Master Car Builders' Association. When not so loaded they will not be accepted.
20	Cotton on Open Cars	This Company will decline to handle Cotton shipments loaded on open cars.
22	Explosives and Inflammables	Shipments of Explosives and Inflammables will be accepted only after a full compliance by shippers or delivering carrier with the rules and regulations of the Interstate Commerce Commission and American Railway Association governing the transportation of such articles. When of a highly inflammable or explosive nature wharfage or handling facilities will not be provided except under special agreement.
24	Shipments for Private Switches	Shipments will not be accepted when consigned in care of private switches for Consignees not located thereon.
26	Special Service	Cars will be accepted at the rates named in this Tariff for movement in the regular course of business only. All cars will be handled in the order of their receipt, so far as conditions or circumstances will permit. This Company will not undertake to render special service except at its convenience, nor will it assume any responsibility whatsoever for failure to render such service when requested to do so.
28	Perishable Freight Under Refrigeration	Cars furnished for loading perishable freight requiring refrigeration should be iced before delivery. Shipments tendered this Company for delivery on its tracks, will be reiced when requested by and at the expense of the owner.
30	Shipper's Order Consignments	This Company will not undertake to accomplish Bills of Lading for shipments consigned Shipper's Order.
32	Acceptance of Shipments for Wharves or Piers When Consigned to Galveston	The Wharves and Piers of this Company are provided for use of vessels receiving and discharging cargo and are not delivery points for business consigned locally received by rail. Shipments will not be accepted from connecting lines for unloading at those points unless for movement from Galveston by vessel, but will be delivered on Public Delivery Tracks, provided for that purpose.
34	Double or Triple Loads	Shipments requiring two or more cars for their transportation will be charged for at rates named for each car handled.
36	Prepayment of Charges	Prepayment of this Company's charges or satisfactory arrangement for the payment thereof must be made before movement of cars or property. Collection of, or responsibility for charges due connecting rail or steamship lines will not be assumed.

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Item No.	Subject	RULES
38	Marking Import Freight Less Than Carloads	Import shipments in less than carload, when forwarded "in bond" will be subject to Rule 7 of the Western (Consolidated) Classification. If such shipments, upon delivery to carrier at Galveston bear blind or abbreviated marking, they will be marked to show the following information: I. T. Entry No..... From ..... (Station) To .....(Consignee) NOTICE: This package should be delivered to the chief officer of the U. S. Customs at..... The packages must be marked by label, tag or stencil, to be placed as close to the marks and numbers of the packages as practicable, and under Customs supervision. The marking will be done by an employee of the carrier or other party acting as the agent of the carrier, and the charge for such marking will be fifteen (15) cents for each package or piece of freight so marked, which charge, unless paid to the carrier, or its agent, as above, at the port of entry, will follow as an advance charge against the shipment. Import shipments in less than carloads entered for consumption at ports of entry will be subject to Rule 7 of the Western (Consolidated) Classification. If such shipments consigned from foreign points to the carrier or its agent at Galveston upon delivery to the carrier bear blind or abbreviated marking they will, after completion of Customs formalities, be marked in conformity with Rule 7 of the Western (Consolidated) Classification by an employee of the carrier, or other party acting as the agent of the carrier, and the charges for such marking will be fifteen (15) cents for each package, or piece of freight so marked, which charge, unless paid to the carrier or its agent, as above, at the port of entry, will follow as an advanced charge against the shipment.
39	High Density Compression of Export Cotton at Galveston	Galveston Wharf Company will permit Cotton moving on through bills of lading via Galveston to be compressed to high density at Galveston. This privilege will be available only at compresses located immediately at shipside, from which it is possible to load the cotton direct from compresses to ship without draying or switching same in cars, and at which the service rendered by Galveston Wharf Company is the same as in making delivery at shipside. Shipper will be required to assume any expense incurred for, or in connection with, the service of compression, handling and delivery to shipside.
39½	Shed Hire Charges on Cotton, Cotton Seed Cake and Cotton Seed Meal	(A) Shed Hire charges on cotton placed in shedded piers or wharves awaiting shipment, will be made as follows: First 15 days free. Next 5 days or fractional part thereof, 1 cent per square bale. Next 5 days or fractional part thereof, 2 cents per square bale. Next 5 days or fractional part thereof, 3 cents per square bale. Next 10 days or fractional part thereof, 4 cents per square bale. Next 20 days or fractional part thereof, 6 cents per square bale. For each additional 10 days or fractional part thereof, 10 cents per square bale. Charges against Round Bale Cotton will be One-Half of the above. (B) Shed hire charges on cotton seed cake and cotton seed meal placed in shedded piers or wharves awaiting shipment will be made as follows: First 15 days free. Next 7 days or fractional part thereof, 10 cents per net ton. For next 7 days or fractional part thereof, 10 cents per net ton. For each additional 7 days or fractional part thereof, 5 cents per net ton. (C) This Company does not engage in the business of storage or warehousing of property on its Wharves or Piers and will not be responsible for loss or damage to property remaining thereon. All property landed or received on any of its Wharves or Piers is thereafter at the risk of the owner and this Company reserves the right to remove any or all such property to any part of the wharves at its convenience and at the risk and expense of the owners, or it may be removed and stored elsewhere than on the Wharves or Piers without notice and at the risk and expense of the owner, and this Company will retain legal possession of all property so removed until all charges are paid.

Commodity Rates Covering the Handling of Traffic

Item No.	SUBJECT	RATES
40	Received from Connecting Lines.	FROM Junctions with Connecting Lines TO All points on the Galveston Wharf Co. All Commodities originating beyond Galveston via rail, per car $4.05
42	Delivered to Connecting Lines	FROM All points on the Galveston Wharf Co. TO Junctions with Connecting Lines, when destined to point beyond Galveston, via Rail. All Commodities, per car $4.05
46	Between Points on the Galveston Wharf Company	BETWEEN All points on the Galveston Wharf Co. Except as otherwise provided in Items Nos. 48 and 52. All Commodities, per car $3.00
48	Milling in Transit Shipments	FROM Mills located on the Galveston Wharf Co. TO Wharves or Piers. Grain Products milled in transit at Mills located on the Galveston Wharf Company, the Railway for whose account handled to furnish equipment free of expense to this company. Per car $3.35
50		On import grain handled through Galveston Wharf Company Elevators, or from shipside for delivery to mills located in Galveston, if milled and forwarded to points beyond Galveston via Rail within thirty days after date of loading of the grain, the Galveston Wharf Company will refund $3.00 per car less car rental paid for car under original load. Claims for refund must be supported by original paid switching bill, signed copy of Railroad Bill of Lading and certificate that shipment covered by Railroad Bill of Lading is the product of the grain covered by the switching bill on which refund is claimed.
52	Extra Service	Cars placed for loading or unloading in accordance with carding and rehandled at the same or to another point on this Company's tracks. For each additional handling, per car ..... $3.35 Cars placed for unloading in accordance with carding and rehandled to Connecting Line, rate in Item 42 will apply. Cars reconsigned before placed will not be subject to this charge. Rate named in Item No. 40 will cover the service to corrected destination.
54	Weighing Cars	For handling cars to and from the Track Scales of this Company to be weighed empty and loaded, in addition to rates herein named. Per car $3.00
56	Passenger Train Equipment	Passenger train cars, viz: Sleeping and Tourist Cars, Coaches, Baggage, Mail, Express or Combination Cars, also Advertising, Demonstration and Exhibition Cars, per car, loaded or empty ..... $8.00 Rate includes the movement of cars from regular interchange tracks to any available point on the tracks of this Company and return to delivering line.
58	Loading or Unloading Cars Forwarded From or Received at Galveston by Consignees or Shippers	A. Shipments of Cotton Seed Cake or Meal, or Cotton Seed Oil in packages covered by local bills of lading to Galveston for export, may be unloaded by consignees if so desired by them; the Galveston Wharf Company making the same allowance to consignees for such service as they (Galveston Wharf Company) receive from the Galveston Terminal Lines under the tariff. B. Shipments of bananas and cocoanuts, in straight or mixed carloads, imported through Galveston, may be loaded into cars by importers, if so desired by them; the Galveston Wharf Company paying the importers for such service the loading charges as provided in this tariff, but not in excess of the amount the Galveston Terminal Lines pay them (Galveston Wharf Company) for the same service. C. Shipments of Raw Sugar, imported through Galveston, may be loaded into cars by importers, if so desired by them; the Galveston Wharf Company paying the importers for such service the loading charges as provided in this tariff, but not in excess of the amount the Galveston Terminal Lines pay them (Galveston Wharf Company) for the same service.

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Section 2

Loading and Unloading Charges on Export, Import and Coastwise Traffic

For unloading from or loading freight into cars, which service will be performed by the Galveston Wharf Company, except as otherwise provided in Item No. 55, or reissues thereof, rates shown below, except as otherwise provided, will apply. For service covered by these rates, see Item No. 555, or reissues thereof.

Less Carload Shipments

Item No.	COMMODITY		RATE
66	All Commodities not otherwise specified		Per 100 lbs., 2½ cents
69	Automobiles and Automobile Trucks, set up, crated.	Unloading	Per 100 lbs., 4 cents
72	Automobiles and Automobile Trucks, set up, crated.	Loading	Per 100 lbs., 6⅛ cents
75	Cotton, Square Bales		Per bale, 5½ cents
78	Cotton, round bales, piled not to exceed three tiers high		Per bale, 3⅛ cents
81	Cotton, transferring, loading and unloading		Per bale, 10 cents
84	Iron and Steel Articles, viz:		
	Articles not otherwise specified, 36 feet 6 in. and over 18 ft. 6 in. in length		Per 100 lbs., 3¼ cents
	Articles not otherwise specified, over 36 feet 6 inches in length		Per 100 lbs., 3 cents
	Plate Iron and Steel, including Boiler and Tank Plates		Per 100 lbs., 3 cents

Carload Shipments

Item No.	COMMODITY	RATE
87	All commodities, not otherwise specified	Per 100 lbs., 2¼ cents
90	Acid Caustic, in drums	Per 100 lbs., 2 cents
93	Apples, in barrels	Per 100 lbs., 2 cents
96	Asphalt and Asphaltum, in dry or solid form, in sacks or open barrels	Per 100 lbs., 2 cents
99	Asphalt or Asphaltum, in tight barrels	Per 100 lbs., 1½ cents
102	Automobiles and Automobile Trucks, set up, not crated. Unload'g	Per 100 lbs., 4 cents
105	Automobiles and Automobile Trucks, set up, crated. Loading	Per 100 lbs., 6⅛ cents
108	Bagging for Baling Cotton, in rolls and bales	Per 100 lbs., 1½ cents
111	Bagging, old second-hand, in bales	Per 100 lbs., 2 cents
114	Bags, Paper, in bundles or boxes	Per 100 lbs., 2 cents
117	Bananas (See Note 1)	Per Car, $12.00
120	Baskets, all kinds, nested or in bundles	Per 100 lbs., 2½ cents
123	Beer, in bulk, in kegs, barrels or casks	Per 100 lbs., 1½ cents
126	Beer, bottled, in barrels, casks or boxes	Per 100 lbs., 2 cents
129	Boots and Shoes, including rubber goods, in cases	Per 100 lbs., 2½ cents
132	Borax, in sacks	Per 100 lbs., 2 cents
135	Bottles, in boxes	Per 100 lbs., 2 cents
138	Buckets and Tubs, tin or iron	Per 100 lbs., 2½ cents
141	Bullion-Copper, in bars, pigs or plates	Per 100 lbs., 1⅛ cents
144	Canned Goods, in cases	Per 100 lbs., 2 cents
147	Carriages, Baby	Per 100 lbs., 2½ cents
150	Cars for Tram Roads	Per 100 lbs., 2 cents
153	Cartridges, in cases	Per 100 lbs., 2 cents
156	Cement and Cement Plaster, in sacks	Per 100 lbs., 1⅛ cents
159	Cement and Cement Plaster, in barrels	Per 100 lbs., 1⅛ cents
162	Cider, in barrels	Per 100 lbs., 1⅛ cents
165	Coffee, in boxes, barrels or bags	Per 100 lbs., 2 cents
169	Copper, in pigs or bars	Per 100 lbs., 1½ cents
172	Copper Ore and Bullion, in bars or plates	Per 100 lbs., 1½ cents
175	Copper Matte, in sacks	Per 100 lbs., 1½ cents
178	Copra Cake and Meal, in sacks, Unloading. (See Note 2)	Per 100 lbs., 1½ cents
181	Cottonseed Meal and Cake, in sacks	Per 100 lbs., 1½ cents
183	Cottonseed Cake, in bulk	Per 100 lbs., 2¼ cents
184	Cottonseed Meal and Cake, unloaded at grinding plant at Pier 38	Per Net Ton, 45 cents
187	Cotton, transferring, loading and unloading	Per bale, 10 cents
190	Cotton, all wharf piers	Per bale, 5½ cents
193	Cotton, round bale, piled not to exceed three tiers high	Per bale, 3⅛ cents
196	Crockery, in crates or casks	Per 100 lbs., 2 cents
199	Cylinders, Gas, empty	Per 100 lbs., 2 cents
202	Dry Goods, all kinds, in cases	Per 100 lbs., 2½ cents
205	Earthenware, in crates, casks or barrels	Per 100 lbs., 2 cents
208	Flasks, in boxes, barrels or crates	Per 100 lbs., 2 cents
211	Flour, in sacks or barrels	Per 100 lbs., 1⅛ cents
214	Fruit, Dried, all kinds, in bags or boxes	Per 100 lbs., 2 cents
217	Furniture, all kinds	Per 100 lbs., 2½ cents
220	Grain, in sacks, viz: Corn, Rye, Oats, Wheat, Barley and Kaffir Corn	Per 100 lbs., 1⅛ cents
223	Grain, in bulk, at Sacking Elevator for sacking	Per Net Ton, 15½ cents

NOTE 1.—Rate named includes service of loading, checking, sealing, carding and reporting cars, but does not include expense of equipping cars with false bottoms, special appliances or material. Cars must be fully equipped before delivery.

NOTE 2.—Applies only when for Export or Outbound Coastwise Traffic.

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Loading and Unloading Charges, Continued.

Item No.	COMMODITY	RATE
226	Granite, each piece in shipment weighing under 10,000 lbs.	Per 100 lbs., 3 cents
229	Granite, any piece weighing 10,000 lbs. or over for full shipment	Per 100 lbs., 2½ cents
232	Guayule, in bales	Per bale, 3 cents
235	Hats and Caps, in cases	Per 100 lbs., 2½ cents
238	Hay, in bales	Per 100 lbs., 3 cents
241	Hides, Green or Dry, in bundles or bales	Per 100 lbs., 1¼ cents
244	Iron and Steel Articles, viz:	
	Articles not otherwise specified, 18 ft. 6 in. and under in length	Per 100 lbs., 2½ cents
	Articles not otherwise specified, 36 feet 6 in. and over 18 ft. 6 in. in length	Per 100 lbs., 2¼ cents
	Articles not otherwise specified, over 36 ft. 6 in. in length	Per 100 lbs., 3 cents
	Billets, Blooms, Ingots, old Car Wheels and Axles, bars, chain iron and wire rods in coils, unfinished, not drawn through a die. Unloading	Per 100 lbs., 1¾ cents
	Chain, loose or in bundles	Per 100 lbs., 2½ cents
	Cotton Bale Ties, in bundles	Per 100 lbs., 1½ cents
	Horse Shoes and Toe Calks, in kegs or boxes	Per 100 lbs., 3 cents
	Nails and Staples, in kegs and boxes	Per 100 lbs., 1¼ cents
	Nuts, Bolts and Washers, in barrels or kegs, loading	Per 100 lbs., 2¼ cents
	Pig Iron	Per 100 lbs., 1½ cents
	Pipe and Fittings, in coal cars	Per 100 lbs., 3 cents
	Pipe and Fittings, in box cars	Per 100 lbs., 2½ cents
	Plate, including Boiler and Tank Plate	Per 100 lbs., 3 cents
	Rails, for tram roads	Per 100 lbs., 2 cents
	Rails, on flat cars, gross ton 2240 lbs.	Per ton, 30 cents
	Rails, on coal cars, gross ton 2240 lbs	Per ton, 35 cents
	Rails, on stock cars, gross ton 2240 lbs.	Per ton, 40 cents
	Rail Splices and Bolts, in box cars	Per 100 lbs., 1¼ cents
	Rail Splices and Bolts, in coal cars	Per 100 lbs., 3 cents
	Wire, smooth or barbed, in rolls or on reels	Per 100 lbs., 3 cents
	Wire Fence and Netting, in rolls	Per 100 lbs., 2½ cents
	Ixtle, in bales	Per bale, 3 cents
248	Jute, in bales	Per 100 lbs., 1¼ cents
251	Kanit, in bulk, loaded from wharf	Per 100 lbs., 4 cents
254	Kanit, in bulk, loaded direct from ship to car with ship's tackle	Per 100 lbs., 2½ cents
257	Lard and Lard Compound, in barrels or tierces	Per 100 lbs., 1½ cents
260	Lead, Pig and Bars	Per 100 lbs., 1½ cents
263	Lime, in barrels	Per 100 lbs., 1½ cents
267	Linoleum, in rolls or crates	Per 100 lbs., 2½ cents
270	Linseed Meal and Cake	Per 100 lbs., 1½ cents
273	Liquors, Alcoholic, in barrels	Per 100 lbs., 1½ cents
276	Liquors, Alcoholic, in cases	Per 100 lbs., 2 cents
278	Logs, all kinds, from flat cars	Per car, $7.50
281	Logs, all kinds, from coal cars	Per car, $9.00
284	Lumber, from flat cars, checking $1.00 per car; stacking, 10 cents per net ton additional	Per 100 lbs., 1½ cents
287	Lumber, from other cars, checking $1.00 per car; stacking 10 cents per net ton additional	Per 100 lbs., 1¾ cents
290	Lye, in boxes	Per 100 lbs., 3 cents
294	Machinery, all pieces weighing less than 10,000 lbs.	Per 100 lbs., 3½ cents
297	Machinery, any piece weighing 10,000 lbs. or more, for full ship't.	Per 100 lbs., 4 cents
300	Marble, any piece weighing 10,000 lbs. or over, for full shipment	Per 100 lbs., 2½ cents
303	Marble, all pieces weighing under 10,000 lbs.	Per 100 lbs., 3 cents
305	Molasses and Syrup, in barrels	Per 100 lbs., 1¼ cents
308	Oil, all kinds, in barrels	Per 100 lbs., 1¼ cents
311	Oils, all kinds, in cases	Per 100 lbs., 3 cents
313	Oil Cloth, in rolls or crates	Per 100 lbs., 2½ cents
316	Ore, in sacks	Per 100 lbs., 1½ cents
319	Ore, Manganese, in bulk	Per 100 lbs., 3 cents
322	Packing House Products, in cases, as described in Item No. 931	Per 100 lbs., 3 cents
325	Paper, all kinds, rolls or bundles	Per 100 lbs., 3 cents
330	Paper Bottle Wrappers, in bundles or cases	Per 100 lbs., 3 cents
333	Peanut Cake and Meal, in sacks, unloading (See Note 2, Page 8)	Per 100 lbs., 1½ cents
337	Pearline, in boxes	Per 100 lbs., 3 cents
343	Pecans, in sacks or barrels	Per 100 lbs., 1¼ cents
346	Pelts, Sheep or Goat	Per 100 lbs., 1¼ cents
349	Phosphate or Phosphate Rock, including Acid Phosphate in bulk, loaded from wharf	Per 100 lbs., 4 cents
352	Phosphate or Phosphate Rock, including Acid Phosphate, loaded direct from ship to car with ship's tackle	Per 100 lbs., 2¼ cents
355	Piling and Poles, wooden	Per 100 lbs., 3 cents
358	Potash, in boxes	Per 100 lbs., 3 cents
365	Potatoes, in barrels or sacks	Per 100 lbs., 3 cents
368	Powders, Washing, in boxes	Per 100 lbs., 3 cents
372	Rice, in barrels or sacks, unloading	Per 100 lbs., 1½ cents
(X) 375	Rice, in cases	Per 100 lbs., 3 cents
378		

898M

Loading and Unloading Charges, Continued.

Item No.	COMMODITY	RATE
391	Rice Hulls, in sacks	Per 100 lbs., 2 cents
395	Roofing Paper, Felt	Per 100 lbs., 2 cents
399	Rope, all kinds, except Wire Rope, in bundles, bales, boxes, or on reels	Per 100 lbs., 2 cents
404	Rosin, in barrels	Per 100 lbs., 1½ cents
408	Sacks, Old, in bales	Per 100 lbs., 2 cents
402	Salt, in barrels	Per 100 lbs., 1⅛ cents
405	Salt, in sacks	Per 100 lbs., 1⅛ cents
410	Sesame Seed Cake and Meal, in sacks, unloading (See Note 2, Page 8)	Per 100 lbs., 1½ cents
414	Sewing Machines, crated	Per 100 lbs., 3⅛ cents
418	Shooks, in bundles	Per 100 lbs., 2 cents
422	Sisal, in bales	Per 100 lbs., 2 cents
426	Slate Roofing, in boxes, barrels or crates	Per 100 lbs., 2 cents
430	Soap Stock and Grease, in barrels	Per 100 lbs., 1½ cents
433	Soap, in boxes	Per 100 lbs., 2 cents
440	Soda and Nitrate Soda, in boxes or barrels	Per 100 lbs., 2 cents
443	Soda Ash, in sacks	Per 100 lbs., 2 cents
447	Soya Bean Cake and Meal, in sacks, Unloading (See Note 2, Page 8)	Per 100 lbs., 1⅛ cents
452	Spelter, in pigs, bars or plates	Per 100 lbs., 1⅛ cents
456	Staves, all kinds, stacking 10c per net ton additional	Per 100 lbs., 1¾ cents
460	Stone, all pieces weighing under 10,000 lbs.	Per 100 lbs., 2 cents
464	Stone, any piece weighing 10,000 lbs. or more, for full shipment	Per 100 lbs., 3½ cents
468	Stoneware, in crates or casks	Per 100 lbs., 2 cents
472	Sugar, in sacks or barrels, loading	Per 100 lbs., 2 cents
475	Sugar, in sacks or barrels, unloading	Per 100 lbs., 1¾ cents
478	Sulphur, in barrels	Per 100 lbs., 2 cents
483	Ties, Railroad	Lumber rates apply.
487	Timbers, 6x8 in. or over, or other dimensions equaling 6x8 inches, from open cars; stacking 10c per net ton additional	Per 100 lbs., 2 cents
491	Tubs and Buckets, Tin or Iron	Per 100 lbs., 3⅛ cents
492	Turpentine, in barrels	Per 100 lbs., 1½ cents
494	Twine, Binding	Per 100 lbs., 2 cents
498	Vanadium Rock, in sacks	Per 100 lbs., 2 cents
502	Vanadium Rock, in bulk	Per 100 lbs., 3¼ cents
506	Vinegar, in barrels	Per 100 lbs., 1½ cents
510	Vitrol, in cases or casks	Per 100 lbs., 2 cents
514	Washing Powder, in boxes	Per 100 lbs., 2 cents
519	Waste, in bales	Per 100 lbs., 2 cents
525	Whisky, in barrels	Per 100 lbs., 1⅛ cents
528	Willow Ware	Per 100 lbs., 3 cents
531	Wines and Liquors, in cases	Per 100 lbs., 2 cents
534	Wine, in barrels	Per 100 lbs., 1½ cents
537	Wool, Greased, in sacks	Per 100 lbs., 2 cents
540	Wool, all kinds, in bales	Per 100 lbs., 1⅛ cents
545	Wool, Scoured, in sacks	Per sack, 4 cents
550	Zacatan, in bales	Per bale, 2 cents

SERVICE COVERED BY LOADING AND UNLOADING RATES

Item No. 555

A. Rates named in Items Nos. 66 to 550, or reissues thereof, inclusive, cover only the labor and clerical expense incident to unloading from or loading freight into cars and receiving from or delivering same to Steamship Agents, sealing cars, stacking freight unloaded, except as otherwise provided, reporting seals and condition of freight to connecting lines for whose account handled and bracing or staking freight loaded.

B. At a rate of 17½c per car, in addition to rates named herein, to apply against all cars handled at wharves or piers, this Company will provide Trucks, Tools, Supplies, Stationery, etc., necessary for the handling of all freight loaded or unloaded. This rate does not include the use of Machinery, Hoists or Derricks, or cost of material for staking or bracing freight.

C. Machinery, Hoists or Derricks will be furnished only at this Company's convenience upon such terms and conditions as circumstances and character of freight to be handled may justify, except that rates named for handling logs and timbers include use of machinery, hoists or derricks when necessary.

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Section 3

Rates and Rules Governing the Handling of Traffic Over the Wharves and Piers of the Galveston Wharf Company.

Item No.	SUBJECT	RULES
560	Payment of Charges	All vessels and their owners landing goods on the wharves or piers, or receiving goods from or over the wharves or piers, or delivering or receiving oils by pipe line, or delivering or receiving goods from barges or other craft while said vessel is berthed at a wharf or pier, thereby contract to pay and are responsible for the wharfage on the same at the rates provided herein to be collected either from vessels, their owners or their agents.
565	Traffic Transhipped or Reshipped	Traffic discharged from vessels for trans-shipment by vessel, having paid inward wharfage as provided in Items 588 to 720, inclusive, if reloaded within fifteen days, and has not been removed from the wharves or changed ownership, will be given free wharfage on the outward movement. Time to be computed from the first 7 a. m. after date of discharge, Sundays and legal holidays excepted. **EXCEPTIONS** 1st. Cotton will be charged wharfage on the outward movement only, provided shipments have not been removed from the wharf or changed ownership and will not be subject to time limit. 2nd. Coal and bulk fuel oil may be removed from the wharves and will be given free wharfage when reshipped.
570	Creosoting in Transit	Lumber, Ties, Timber, Piling, Poles, and Posts, received at Galveston by vessel for Creosoting, having paid the inward wharfage rate provided herein, will when treated, be given free wharfage on the outward movement.
575	Insurance	The charges provided for herein do not include any expense for fire or storm insurance covering owners' interest in the property, nor will such insurance be effected by this Company under its policies.
580	Storage	This Company does not engage in the business of storage or warehousing of property on its Wharves or Piers and will not be responsible for loss or damage to property remaining thereon. All property landed or received on any of its Wharves or Piers is thereafter at the risk of the owner and this Company reserves the right to remove any or all such property to any part of the wharves at its convenience and at the risk and expense of the owners, or it may be removed and stored elsewhere than on the Wharves or Piers without notice and at the risk and expense of the owner, and this Company will retain legal possession of all property so removed until all charges are paid.
585	Damaging Wharves, Aprons or Piers	The discharge of heavy articles or the stacking of freight in such quantities as will cause excessive weight upon the piers, aprons or wharves will not be permitted without written authority, and at the risk of vessels, their agents, or owner of property discharged. Vessels and their agents will be held responsible for all damage to Piers, aprons or wharves caused by vessels docking or by discharging heavy articles or stacking excessive tonnage upon the same without written authority of this company.

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED. Applying on Coastwise Traffic, Inbound or Outbound, Between Atlantic Seaboard and Gulf Points Only, and Galveston, Texas.

Item No	COMMODITY	RATE
588	(R) All Classes and Commodities, except Cotton and Lumber—Per ton of 2000 lbs.....	25
590	Cotton, in Bales or Sacks, Outbound or Inbound	2
593	Lumber and Timbers, Pine, except as otherwise provided in Item No. 570, per 1000 ft.	19

(R) Denotes Reduction in Rates.

(y)

86Y

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Import and Coastwise Traffic Inward, except as provided for under Items 588, 590 and 592.

Item No.	COMMODITY	RATE
596	All Articles not otherwise specified	1¼
602	Automobiles, set up	6½
603	Automobiles, knocked down and crated	4
606	Bananas, per bunch	¾
610	Brick, Fire	1¾
613	Brick, Common and Paving, per 1000	37½
617	Coal	1½
621	Cocoa Nuts	3
626	Cotton (see Item No. 565)	3
631	Creosote, in bulk, 50 gallons to be considered a barrel, per barrel	4
640	Fish, Fresh	6½
650	Live Stock, viz:	
	Calves, Goats, Sheep and Swine, per head	12½
	Colts and Donkeys, per head	25
	Horses, Mules and Cattle, per head	32
655	Lumber and Timbers, Pine, per 1000 feet	37½
660	Oil, Crude or Fuel, in bulk, pumped through pipe lines from shipside to storage tanks, per unit of 50 gallons	3
665	Piling and Poles, wooden, not over 30 feet in length, each	6¼
668	Piling and Poles, wooden, 40 feet and over 30 feet in length, each	9½
671	Piling and Poles, wooden, over 40 feet in length, each	12½
675	Rice, Rough	1½
680	Shell, per cubic yard	5
682	Sand, per cubic yard	6½
690	Sugar, Crude, in sacks, barrels or tierces	1
694	Sulphur, in bulk, gross ton 2240 lbs.	Per ton, 20 cents
695	Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.	Per ton, 20 cents
697	Ties, Cross, per tie	1½
700	Vehicles, Passenger, set up	6½
703	Vehicles, knocked down and crated	4
706	Wagons, Light Delivery, set up	6½
709	Wagons, Light Delivery, knocked down and crated	4
712	Wagons, Farm, set up	4
715	Wagons, Farm, knocked down	2½
720	Wool, in bales or sacks	3

WHARFAGE RATES IN CENTS PER 100 POUNDS, EXCEPT AS OTHERWISE PROVIDED.
Applying on Export and Coastwise Traffic Outward, except as provided for under Items 588, 590 and 592.

Item No.	COMMODITY	RATE
725	All Articles not otherwise specified	2½
730	Alfalfa Meal, in sacks	1¼
733	Ammonia, in Iron Drums	1¼
736	Antimony, in sacks	1¼
740	Asphalt and Asphaltum, in barrels or bags	1¼
743	Automobiles, set up	6½
746	Automobiles, knocked down and crated	4
749	Beans, in bags or barrels	1½
752	Beer, in wood	2¼
755	Bones and Hoofs	3
756	Borate, in boxes, barrels or sacks	1¼
758	Canned Goods, viz: Fish, Fruit, Meats, Soups, Tamales, Olives, Vegetables, Catsup, Fruit Butter, Jams and Jellies, in tin, glass or earthenware, boxed, and Fruit Juices in barrels, or in tin, glass or earthenware, boxed	1¼
763	Cement, in sacks or barrels	1¼
767	Coal, except as otherwise provided in Item No. 565	1½
768	(R) Coke, Petroleum	1½
770	Copper Matte	1¼
775	Copra Cake and Meal, in sacks	1½
778	Copra Oil, in barrels or in bulk	1¼
781	Cotton, in bales or sacks	3
784	Cotton Bagging, Product of Cotton Factories	2½
787	Cotton Piece Goods	2½
790	Cotton Seed Cake and Meal	1
793	Cotton Seed Oil, in barrels or in bulk	1¼
796	Cotton Seed and Cotton Seed Hulls, in sacks	1¼
800	Eggs, in cases	2½
810	Fence Posts, each	1½
813	Fertilizer, in sacks	1¼
820	Fuller's Earth, in sacks	1¼
825	Glucose, in barrels	1¼
830	Grain, viz: Dried and Brewer's, in sacks	1¼
833	(R) Grain, viz: Wheat, Corn, Rye, Oats, Barley and Kaffir Corn, through Elevators other than Galveston Wharf Co.	½
836	Grain, viz: Wheat, Corn, Rye, Oats, Barley and Kaffir Corn, in sacks or barrels	1½

(R) Denotes Reduction in Rate.

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Wharfage Rates, Continued.

Item No.	COMMODITY.	RATE
840	Grain Products, viz: Wheat, Buckwheat, and Rye Flour, Corn Meal, Corn, Barley, Oats or Rye Chops, Bran, Screenings, Middlings, Shorts, Mill Feed, Mill Stuff and Prepared Stock Foods, in sacks or barrels	1½
844	Grass Seed, all kinds, in sacks or barrels	2
850	Guayule, in sacks or barrels	1½
855	Handles, Wooden, in bundles or crates	1½
858	Hay, in bales	2
861	Heading, loose or in bundles	1½
864	Hides, Green or Dry, in bales or bundles	2
868	Horns	2
870	Ice	1½
875	Ixtle, in bales	1½
878	Iron and Steel Articles, viz: Billets, Blooms, Ingots, Old Carwheels and Axles, Bars, Chain Iron, Rough Forgings, Pig Iron, Scrap Iron and Wire Rods in Coils, unfinished, not drawn through a die	1½
	(R) New Car Wheels	1½
	Pig Iron	1½
	Scrap Iron	1½
885	Junk	1½
890	Linseed Meal and Cake, in sacks	1½
893	Live Stock, viz: Calves, Goats, Sheep and Swine, per head	12½
895	Colts and Donkeys, per head	85
898	Horses, Mules and Cattle, per head	35
902	Logs	1½
905	Lumber and Timbers, Hardwood, except as otherwise provided in Item No. 570	1½
906	Lumber and Timbers, Pine, except as otherwise provided in Item No. 570, per 1000 feet, export	37½
911	Lumber and Timbers, Pine, except as otherwise provided in Item No. 570, per 1000 feet, coastwise	19
914	Oil, Crude, in Bulk, except as otherwise provided in Item No. 565, Per Unit of 50 Gallons	2
916	Oil, Crude, in barrels	2
918	Oil, Refined Petroleum, in bulk	2
920	Oil, Refined Petroleum, in packages	2½
923	Onions, in sacks, crates or barrels	2½
927	Ore and Bullion, viz: Copper, Iron, Lead, Manganese, Magnesite, Spelter and Zinc	1¼
931	Packing House Products, viz:	1¼
	Below is a complete list of the articles on which the Packing House Products rates named herein will apply. All shipments must be properly packed.	
	Back Fat, in Packages.	
	Bacon (Cured), in bags, barrels, boxes, casks or crates.	
	Beef, Dried, in sacks, boxes, barrels, casks or crates.	
	Beef and Hog Intestines, uncleaned, in boxes or barrels.	
	Beef, Pickled.	
	Bladders, in boxes or barrels.	
	Cotton Seed Foots.	
	Cotton Seed Oil Fatty Acids.	
	Cracklings.	
	Deglycerinated Cotton Seed Oil.	
	Glue, Flake, ground, jelly and Sheet.	
	Grease in buckets, tubs, pails, barrels or iron drums.	
	Hams, boiled, packed.	
	Hams and Shoulders, cured, in bags, boxes, barrels, casks or crates.	
	Lard, in packages.	
	Lard, Leaf, packed.	
	Lard Oil, in packages.	
	Lard Substitutes.	
	Meats, cured, dried or salted, in bags, boxes, barrels, casks or crates.	
	Meats, pickled, in glass, boxes, crates or barrels.	
	Meats, Canned, including Canned Meats with Vegetable Ingredients, Canned Sausage, Chicken Tamales, Chili Con Carne, Corned Beef, Corned Beef Hash, Meats, Dried or Smoked, Pickled or Potted.	
	Neat's-Foot Oil.	
	Neat's-Foot Stock.	
	Neutral.	
	Oil, Oleo, in barrels or tierces.	
	Oil, Red.	
	Oleo Stock.	
	Pigs' Feet, pickled in brine, in wood.	
	Pork, cured, packed.	
	Sausage, dried, smoked or canned.	
	Sausage Casings, pickled, in barrels or kegs.	
	Sheepskin Trimmings, green.	
	Stearine.	
	Tails or Switches, green.	
	Tallow.	
	Tallow Oil, in packages.	
	Tongues, pickled, in wood or in glass.	
	Tripe, in kegs, barrels or casks.	
	Weasands, dry, in boxes or barrels.	
935	Peanut Cake and Meal, in sacks	1½
938	Peanut Oil, in barrels or in bulk	1¼
941	Peas, Dried, in barrels or sacks	1¼
944	Piling and Poles, wooden, except as otherwise provided in Item No. 570, 30 feet and under in length, each	6½
	Over 30 feet to 40 feet inclusive, each	9½
	Over 40 feet, each	12½
947	Plaster, in barrels or sacks	1¼
950	Rice or Rice Products, viz: Bran, Feed, Flakes, Flour, Hulls, and Polish, in sacks, barrels or cases	1½
(3) 953	Rock, Crushed, viz.: Asphalt, Gypsum, Granite, Sandstone and Vanadium	1¼
956	Rosin, in barrels	1¼
960	Salt, in bags or barrels	2

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Wharfage Rates Continued.

Item No.	COMMODITY	RATE
963	Sesame Seed Cake and Meal, in sacks	1½
965	Sesame Seed Oil, in barrels or in bulk	1¾
968	Shooks, in bundles	1¾
973	Sisal, in bales	1¾
975	Soap Stock, in bags, boxes or barrels	1¾
978	Soya Bean Cake and Meal, in sacks	1½
980	Soya Bean Oil, in barrels or in bulk	1¾
983	Starch, in barrels, boxes or bags	1¾
986	Staves	1¾
989	Sugar, in barrels or sacks	1¾
991	Sugar, in boxes	2½
994	Sulphur, in bulk, gross ton 2240 lbs.	Per ton, 20 cents
996	Sulphur, in boxes, barrels or sacks, gross ton 2240 lbs.	Per ton, 20 cents
1000	Syrup, Glucose or Corn, unmixed, in barrels	1¾
1003	Syrup, except Glucose or Corn Syrup, unmixed, in barrels or cases	2
1006	Tar, in barrels	2
1010	Ties, Railway, Pine, per tie, export — Except as otherwise provided in Item No. 570.	1½
1013	Ties, Railway, Hardwood, per tie, export — Except as otherwise provided in Item No. 570.	1¾
1016	Ties, Railway, Creosoted, per tie, export — Except as otherwise provided in Item No. 570.	2
1020	Ties, Railway, all kinds, coastwise, except as otherwise provided in Item No. 570, per tie	1
1022	Turpentine, in barrels	1¾
1023	Vinegar, in barrels	2
1026	Wax, Paraffine	1¾
1027	(R) Wax, Candelillia	1¼
1029	Whiskey, in barrels	2
1032	Wine, in barrels	2
1035	Wood Preserver, in barrels	2
1040	Zacatan, in bales	1¾

(R) Denotes Reduction in Rates.

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EXHIBIT E

Form 709

MALLORY STEAMSHIP COMPANY

759-TEXAS & NEW ORLEANS RAILROAD CO.

FREIGHT WAYBILL

FOR	GROSS WEIGHT OF CAR AND CONTENTS FOR ENGINE RATING

TRANSFERRED TO — AT

TRANSFERRED TO — AT

R INITIAL AND NUMBER

DATE 1-6 26 WAYBILL NO. GH-38

ich Junction and Carrier in Route Order)

es

FROM— (STATION) (STATE)

New York NY Concho 112

(STATE)

aso, Texas

SHIPPER (Show Original Point of Shipment When Applied)

NYC RR Co. MCS Co. ST Andrews, NB
car CPR-97212

RESS (Show Final Destination When Beyond)

D. OPERATIVE SARD CO.

AN GROC. CO.

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INDICATE BY SYMBOL IN COLUMN PROVIDED HOW WEIGHTS WERE OBTAINED.
R—RAILROAD SCALE.
A—WEIGHING BUREAU OR AGREEMENT.
T—TARIFF CLASSIFICATION OR MINIMUM.
S—SHIPPER'S AGREEMENT OR TESTED WEIGHT.
E—ESTIMATED (WEIGH AND CORRECT).

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THIS WAYBILL SHALL BE USED FOR ALL SINGLE CONSIGNMENTS, WHETHER CARLOAD OR LESS CARLOAD, AND WHETHER LOCAL OR INTERLINE

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YARD STAMPS MUST BE SHOWN ON BACK OF THIS WAYBILL

FORWARDING AGENTS WILL SHOW JUNCTION STAMPS IN THE SPACE AND IN THE ORDER PROVIDED BELOW

SECOND JUNCTION	THIRD JUNCTION	FOURTH JUNCTION	FIFTH JUNCTION

759—TEXAS & NEW ORLEANS CO.

868

[fol. 96-f-2] [File endorsement omitted.]

[fol. 97] IN COURT OF CIVIL APPEALS OF TEXAS, EIGHTH SUPREME JUDICIAL DISTRICT

JUDGMENT—Entered January 17, 1929

January 17th, 1929. This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court be reversed and this Court proceeded to render such judgment as should have been rendered by the Court below, to-wit:

It is therefore considered, adjudged and decreed by the Court that the plaintiffs, American Grocery Company, a corporation, Charles L. Pomeroy Company, a corporation, The H. Lesinsky Company, a corporation, F. S. Ainsa Company, Inc., a corporation, Joseph Renin, doing business under the name and style of Western Grocery Company, Adolph Nasits, doing business as Nasits Sales Company, Max Franklin and Harry Goodwin, doing business under the name and style of Franklin & Goodwin, and C. H. Lawrence, do recover of and from the defendant, Galveston, Harrisburg & San Antonio Railway Company, the sum of Five Thousand Three Hundred Seventy-six Dollars and Twenty-five cents ($5376.25), with interest thereon at the rate of six per cent (6%) per annum from January 18th, 1926, until paid, and all costs of suit, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the defendants, Mallory Steamship Company and Galveston Wharf Company do each and both go hence without day and recover their costs, and that as to each of said defendants the plaintiffs herein take nothing, and [fol. 98] each and both of said defendants recover their costs herein, for which let execution issue.

It is further considered, ordered, adjudged and decreed by the Court that the defendant Galveston, Harrisburg & San Antonio Railway Company take nothing as against the defendants, Mallory Steamship Company and Galveston

Wharf Company, by reason of its cross-action, and that as to the same the said defendants go hence without day.

It is further considered, adjudged and ordered, that the appellee, Galveston, Harrisburg & San Antonio Railway Company, pay all costs in this behalf expended and incurred, both in this Court and in the Court below, for all of which let execution issue, and this decision be certified below for observance.

[fol. 99] In Court of Civil Appeals of Texas

No. 2117

Galveston Wharf Company, Plaintiff in Error,

v.

American Grocery Co. et al., Defendants in Error

Appeal from the District Court El Paso County, Texas

Opinion—Filed January 17, 1929

This suit was brought by the American Grocery Company, a corporation, and other plaintiffs, against the Mallory Steamship Company, hereinafter referred to as Steamship Company, the Galveston, Harrisburg & San Antonio Railway Company, hereinafter referred to as Railway Company, and the Galveston Wharf Company, hereinafter referred to as Wharf Company, to recover the value of a quantity of sardines destroyed by fire on the destruction by fire of the pier at Galveston, Texas, on which the shipment of the sardines had been placed.

The trial court made and filed findings of fact which we adopt, except as some sections of the findings may be modified or changed on consideration under the proposition or propositions referring thereto. The findings state by number paragraphs very minutely the facts upon which the several parties joined issue and will be helpful by reference thereto without a further statement of the pleadings or the facts proved.

"Findings of Fact

"1. I find that on or about December 23, 1925, the Maine Co-operative Sardine Company delivered to the Seaport

Navigation Company, a common carrier, at Eastport, Maine, 1105 cases of Oil Keyless Sardines and 20 cases Key Deck Sardines, for which a through bill of lading was issued, shippers order, notify American Grocery Company, El Paso, Texas. That said merchandise was routed Seaport Navigation Company, Mallory Steamship Company and Southern Pacific Lines. That said shipment was by the Navigation Company delivered to the Mallory Steamship Company at New York City about the 6th of January, [fol. 100] 1926. That same was transported by the Mallory Steamship Company on their steamship Concho to Galveston, Texas, where it arrived about 7:00 a. m., January 13, 1926.

"II. That said Mallory Steamship Company began unloading the freights from said vessel at about 8:30 a. m. January 13, 1926, onto the wharves which had been set aside and provided for that purpose, and that the entire cargo of said vessel had been entirely unloaded and placed on the wharf prior to 5:30 p. m. of said date.

"III. That the shipment of sardines above referred to had been unloaded by the Mallory Steamship Company and had been by said Company put at the designated place on the wharf, and was in proper condition for further transportation to point of destination at and before 4:00 p. m. of said date.

"IV. That the wharf at which the steamship Concho docked, and at which the cargo thereof was unloaded, including the shipment above referred to, was owned by the defendant Galveston Wharf Company, but the defendant Mallory Steamship Company and the defendant Galveston Wharf Company, under date of July 1, 1914, entered into a written agreement under which, for the consideration of $5,000.00 per year, payable in monthly equal installments, and for a period of five years, ending on the 30th day of June, 1919, the Wharf Company agreed to permit and allow the Mallory Steamship Company and its affiliated lines to berth its and their vessels alongside, among others, the pier 24, at which the cargo above referred to was unloaded.

"Paragraph B of Article III of said Contract reads as follows:

" 'It is distinctly agreed and understood that the payment of the said sum of Five Thousand and No/100 Dollars ($5,000.00) per annum hereinabove provided for is to be made as shed hire, and in addition thereto, the Wharf Company shall be entitled to collect from the Steamship Company and the Steamship Company will promptly pay to the Wharf Company the regular wharfage and other rates and charges specified in the tariffs published or hereafter to be published by the Wharf Company for all goods, commodities, wares and freight loaded into or out of vessels of the Steamship Company, or its affiliated lines, which shall berth at said piers, and will comply with all rules shown in such tariffs.'

"and Article VI of said contract reads as follows:

" 'It is agreed that the Wharf Company shall in no way be responsible for any loss or damage to any goods or cargoes handled over and through said wharves, sheds and warehouses, unless same be caused by defects in roof of warehouses; and that should the Steamship Company allow any of said wharves to be overloaded at any time so as to cause damage thereto, or to said sheds, the Steamship Company will pay all damages caused thereby and the cost of repairing such wharf or shed.'

[fol. 101] "Article XIV thereof reads as follows:

" 'After the expiration of the said five year period, this contract shall continue in effect, according to the terms and conditions herein specified as long as the business of the Steamship Company, or its affiliated lines at the port of Galveston justifies the same and when such business fails to justify the same, this contract may be terminated by either party by giving to the other party Sixty (60) days' written notice of its intention so to terminate it.'

"That since the execution of said agreement, the Steamship Company has been using, among others, the said pier for the purposes and as provided in the above mentioned contract.

"V. That the Galveston Wharf Company is a chartered transportation Company, owning, in addition to the piers located on the Galveston Bay side of the island, about fifty-one (51) miles of railroad trackage, extending from

said piers along and through its yards in Galveston to connections with the lines of railroad operating out of Galveston, including the Galveston, Harrisburg & San Antonio Railway Company. That said Galveston Wharf Company owns and operates eight (8) switch engines, providing therefor the necessary yard and engine forces.

"That it had on file with the Interstate Commerce Commission and with the Texas Railroad Commission, duly promulgated tariffs covering its charges for the various services performed and to be performed by it. That it makes the regular reports to the Interstate Commerce Commission that are ordinarily made and required of all common carriers by railroad. That it has a general manager, superintendent of terminals, treasurer and the usual other officers as required and necessary in the conduct of that character of business.

"That its railroad tracks extend to and along the Pier 24, where the shipment in question had been unloaded from the steamship.

"That at the time the steamer Concho departed from New York on the voyage in question, there was, by said company, sent by United States mail to its office at Galveston, complete billing of all the shipments on board said vessel. Said billing contained, among others, point of origin of the shipment, name of the shipper, destination and name of the consignee and the routing thereof over railway lines out of Galveston. That this billing was received by the Mallory Steamship Company at Galveston about two or three days prior to the arrival of the vessel, and after a record thereof was made in its wharf office, all of said billing was immediately, and two days prior to the arrival of the vessel, delivered to the defendant Galveston Wharf Company for information and instruction as to the handling of each and all of the shipments contained in said vessel after same had been placed on the wharf by the Steamship Company, and that the defendant Galveston Wharf Company, after making a record of the contents of said billing, delivered same to the respective carrier which was to handle the respective shipments out of and beyond Galveston, and that the billing covering the shipment of sardines in question had been delivered by the Mallory Steamship company to the Galveston Wharf Company two

[fol. 102] days prior to the arrival of said vessel, and said Galveston Wharf Company had delivered the same to the defendant Galveston, Harrisburg & San Antonio Railway Company, which was the railway that was to carry said shipment of sardines from Galveston to El Paso.

"That prior to the arrival of said steamship Concho at Galveston both the defendants, Galveston Wharf Company and Galveston, Harrisburg & San Antonio Railway Company, knew that said shipment of sardines was in said ship and how same was to be routed out of Galveston to destination.

"That the forwarding of said billing from New York, and the method of handling same as above detailed, was the same method that had been used customarily between the various carriers involved for many years, and there was no difference in the method of handling the cargo involved than the method that had been in use for many years, and that, as was usual and customary under such circumstances, the Galveston Wharf Company, through its Superintendent of Terminals, made requisition on the various railroads for the necessary cars to handle the shipments to be moved by them respectively out of Galveston, and that following this custom there had been delivered by the railroads operating out of Galveston to the Galveston Wharf Company seventy-six (76) cars, which cars were se-t to the wharf on the night of January 12 by the Wharf Company for the purpose of loading therein the various shipments routed over the respective railroad, and which were to be delivered from the Steamship Concho, and that said cars were ready and at hand, including a car for the carriage of the shipment of sardines in question.

"VII. That the vessel Concho was unloaded by a force of men provided and paid for by the Mallory Steamship Company, and as each particular shipment was unloaded it was placed, or spotted, in that territory on the wharf which had been usually and customarily set aside for that purpose,—that is to say, the car load freight destined for transit out of Galveston over the Galveston, Harrisburg & San Antonio Railway Company was usually and customarily placed by the Mallory Steamship Company in that territory on the wharf that had been generally designated

by the Wharf Company for that purpose, and so on for the other railroads having freights for carriage on said vessel,—and that the carload of sardines in question was, by the Mallory Steamship Company duly placed in the territory so set aside for the reception and delivery of such freights which were to be carried out of Galveston by the Galveston, Harrisburg & San Antonio Railway Company, and that all the work to be done relative thereto by the Mallory Steamship Company had been fully completed and performed by 4:00 o'clock on the afternoon of January 13, 1926, and that thereafter, and having so made such placement, the Mallory Steamship Company had nothing whatever to do with the further handling or movement of said shipment.

"VIII. That the defendant, Galveston Wharf Company, had a force of men at work on the wharf, whose duty it [fol. 103] was to carry and handle the shipments unloaded from the steamer from the point where same had been placed on the wharf by the Mallory Steamship Company into the cars, and that such handling by the employees of the Galveston Wharf Company was wholly independent of any prior handling by the employees of the Mallory Steamship Company, and same was done as a matter of course, without any character of direction or advice from the Mallory Steamship Company or any of its officers or employees. That the entire physical handling of each and all of said shipments, including the one in question, from the place where located on the wharves by the Mallory Steamship Company, was under the entire direction and control of the Galveston Wharf Company, and that the shipments of sardines in question could have been loaded on the car by the Galveston Wharf Company, and by it moved from the wharf, at any time after 4:00 o'clock on the afternoon of January 13, 1926, and that the time when said shipment was to be loaded on to the car was entirely left to the judgment of the Galveston Wharf Company, and with which the Mallory Steamship Company had nothing to do. That the defendant Galveston Wharf Company exercised its own judgment and discretion as to when and how it would do the loading onto the cars, and during the day of January 13, 1926, the Galveston Wharf Company actually loaded out

some forty-five (45) cars of the freights which had been unloaded from the 'Concho', all of which was done as best suited its convenience, and for which service it was paid the usual tariff rates by the railroad handling the respective shipments out of Galveston to destination.

"IX. That the forces of the Galveston Wharf Company which were engaged in loading freights which had arrived on the steamer Concho quit work at 7:00 p. m. on January 13, and that had they continued to work after that hour the Galveston Wharf Company would have been required to pay them overtime for the service, and that at the time said forces so quit work the freights that had not been loaded into cars were left on the wharf at the designated place, where they had been placed by the Mallory Steamship Company, and that had the forces of the Galveston Wharf Company continued the work of loading until 8:45 or 9:00 o'clock that night, all of the cargo could have been and would have been loaded on cars.

"X. That the car of sardines in question was not loaded out, and same was left by the Galveston Wharf Company on the wharf at the point where it had been placed by the Mallory Steamship Company, and that all of said shipment was destroyed by a fire which broke out at about 1:00 a. m. on the morning of January 14.

"XI. That it was usual and customary for the Galveston Wharf Company to give to the Mallory Steamship Company receipts for goods and shipments after same had been delivered by the Steamship Company to the Wharf Company. However, the Steamship Company never required the Wharf Company to deliver a receipt or receipts before freights and shipments were removed from the wharf, and in fact no receipt was ever issued and delivered to the Steamship Company by the Wharf Company for freight received until two or more days had usually passed after the [fol. 104] shipments and freights had moved out of Galveston. The delivery of receipts for goods and shipments was not a prerequisite required by the Mallory Line before same could be moved from the wharf, and sometimes as much as a week passed after freights had been moved from the wharf by the Galveston Wharf Company before receipt

therefor was delivered by the Wharf Company to the Steamship Company.

"The purpose of receipts was that the Mallory Line might have permanent record thereof for future use, and a receipt when so given, and while signed by the Galveston Wharf Company, was really for account of the railroad transporting the particular freight out of Galveston.

"No receipt for the shipment of sardines in question was delivered to the Mallory Steamship Company by the Galveston Wharf Company.

"XII. That had said shipment of sardines been moved promptly out of Galveston, same would have reached El Paso about the 18th day of January, 1926, and the market value thereof at El Paso, on January 18, 1926, was $5,376.25, and that said shipment, while consigned to the American Grocery Company at El Paso, Texas, was really purchased and would have ben delivered in El Paso in agreed proportions to American Grocery Company, Charles L. Pomeroy Company, the H. Lesinsky Company, F. S. Ainsa Company, Joseph Renin, doing business under the name of Western Grocery Company, Adolph Nasits, doing business as Nasits Sales Company, Max Franklin and Harry Goodman, doing business under the name of Franklin & Goodman, and C. H. Lawrence. That said plaintiffs, and none of them, ever received any of said goods, nor have they, or either of them, ever been paid the value thereof."

From the findings made the trial court concluded as a fact and a matter of law that the Steamship Company had made due delivery of the shipment in question by the placement thereof on the wharf of the Wharf Company, at the point designated for its receipt, and that at the time of its destruction by fire the shipment had been received by and was in the possession of the Wharf Company as a common carrier. The trial court further concluded that the Steamship Company delivered the shipment in due course of transit; that the handling of the shipment by the Wharf Company was an integral part of the transportation between the point of origin and its final destination; that the Wharf Company intended to deliver the shipment to the Railway Company, for transit to its final destination, but that delivery by the Wharf Company to the Railway Com-
[fol. 105] pany had not been made at the time of its de-

struction by fire. The trial court further concluded that Article 6 of the contract between the Wharf Company and the Steamship Company, as set out in the fourth finding of fact, was not a contract of indemnity to the Wharf Company by the Steamship Company and that thereunder the Steamship Company did not assume responsibility for the loss of the goods at the time of the loss in the possession of the Wharf Company. The trial court further concluded that if Article 6, referred to, may be construed as such indemnity to the Wharf Company then, and in that event, it was contrary to public policy and for that reason void, in that it undertakes to exonerate the Wharf Company from loss by reason of its negligence as a common carrier, and that there is no lawful authority for the Steamship Company, a transportation company subject to the Acts of Congress, to become guarantor or surety of another transportation company in the performance of a duty owed to the latter to a shipper. The trial court concluded, under the facts found, that the Wharf Company was liable to plaintiffs for the loss sustained, the amount as in the paragraph 12 of the findings, and the Wharf Company was not entitled to recover over and against the Steamship Company or the Railway Company, the possession at the time of the loss not being with either, the shipment being interstate and the carriers each being subject to the provisions of the Inter-State Commerce Act, and the trial court so entered judgment.

[fol. 106] Opinion

The Wharf Company and the plaintiffs in the suit both appeal by writs of error, the latter doing so for the purpose of preserving its rights against the Steamship Company and Railway Company, in the event the judgment in its favor against the Wharf Company be reversed.

It is quite evident that the plaintiffs in the suit are entitled to judgment against some one of the defendants, and for the amount rendered, and the purpose of the suit is to fix the liability where, under the law and the facts, the liability properly rests. Judgment was rendered against the Wharf Company, and the case is before us for review as to its liability.

The several propositions present three questions, two of law and one of fact.

As briefly as we may state the facts from the findings of the trial court without quoting at too great length therefrom, the Wharf Company is a chartered transportation company, owning the piers located on the Galveston Bay side of the island, and about fifty-one miles of railroad trackage, extending from said piers along and through its yards in Galveston to conections with the Galveston, Harrisburg & San Antonio Railway Company, one of the connecting carriers and the delivering carrier in this shipment, its railroad tracks extending to and along the pier 24, where the shipment in question had been unloaded from the Steamship Company onto that prior. The Wharf Company also owns and operates eight switch engines, providing therefor the necessary yard and engine forces. At the time involved here it had on file with the Interstate Commerce Commission and with the Texas Railroad Commission, duly promulgated tariffs covering its charges for the various services performed and to be performed by it. It [fol. 107] has a general manager, superintendent of terminals, treasurer and the usual other officers as required and necessary in the conduct of that character of business. It makes the regular reports to the Interstate Commerce Commission that are ordinarily made and required of all common carriers by railroad.

The services the Wharf Company performs are substantially the following: It maintains a force of men at work on the wharf whose duty it is, by means of the facilities provided by the Wharf Company, to pick up, carry and handle the shipments unloaded from the steamship from the point where the same had been placed on the wharf by the Steamship company into the cars, such picking up, carrying and handling being wholly independent of any prior handling by the employees of the Steamship Company, and done as a matter of course without any character of advice or direction from the Steamship Company or its employers, the time when and how the shipment was to be loaded on the cars, after the shipment was in its possession or under its control, being left entirely to the judgment of the Wharf Company. Two services of the Wharf Company are mentioned, one designated as a "loading service", by which it would pick up and load a shipment into

the cars of a railroad to be transported to a point on its line, and for which service the tariffs provided a charge which would be paid by the Railroad Company over whose line the particular shipment was to be made. When a shipment had been loaded by the Wharf Company into the cars of a railroad company the Wharf Company would then, as a part of its service, switch the loaded car from the point where loaded on its track, adjacent to the docks, to the connecting tracks of the railroad line which was to carry the shipment to the interior point. This last service was known as a "switching service", and that service was paid for by the railroad company over whose line shipment was to be made to interior points.

[fol. 108] Before considering the legal questions involved we think it well to determine the issue of fact as to the possession of the shipment of sardines at the time of their loss by fire. The trial court concluded from the facts found that, not only as a fact, but also as a matter of law, the Steamship Company having made delivery of the shipment of sardines by its placement on the wharf of the Wharf Company at the point designated for its receipt, the shipment at the time of its destruction by fire was in the possession of the Wharf Company as a common carrier. The trial court's finding as to its possession is challenged by the Wharf Company on the ground that there is no evidence that the place where the sardines were placed on the wharf was designated by it. The Railroad Company also challenges that finding. It is not questioned but that the way-bills covering this shipment were received by the Wharf Company some two days before its arrival at Galveston, the way-bills disclosing the storage indicating the part of the ship where the shipment was stowed, the consignor, consignee, routing out of Galveston, and its destination, and were distributed through the Wharf Company to the Railway Company. In other words, both the Wharf Company and the Railway Company knew that on the Steamship Company's ship "Concho" this particular shipment would arrive at that wharf and pier, and was to be picked up and loaded on the cars of the Railway Company by the Wharf Company and carried to its destination by the Railway Company. It is also unquestioned that the billing for this shipment had been duly written up in the records of

both companies, and cars of the Railway Company set to this particular wharf into which the shipment was to be loaded. There is no question but that the ship "Concho" carrying this shipment was docked at Galveston at about 8:15 a. m. January 13, 1926, and berthed at the Wharf [fol. 109] Company's piers Nos. 24 and 25. Without quoting the evidence, it shows that the unloading of the ship was commenced at 8:30 a. m. on the day of its arrival and was completed on that day at about 5:30 p. m. The evidence shows that this particular shipment was unloaded and placed on the wharf about 3:00 p. m. of that day. F. E. Bertram, Dock Superintendent of the Mallory Steamship Company, testified:

"As to who designates the place on carload shipments (the shipment here was such), it is understood and agreed that they be discharged opposite the part of the ship where they are stowed. A shipment stowed in the forward end of the ship is discharged opposite the forward end, and shipments in the aft end are discharged opposite the aft end. * * * This shipment was in the forward end and it was discharged in that territory that was adjacent to the forward end of the vessel. It was discharged adjacent to the railroad tracks. * * * Cars were placed for this shipment the night before the arrival of the vessel, * * * and these tracks are adjacent to the place where the freight of the forward end of the boat is unloaded. It is about 70 to 80 feet, probably, from the point on the wharf where we place the goods to the adjacent railroad tracks. When the goods are discharged on the wharf by the Mallory Line, the Galveston Wharf Company handles it from that point. * * * The Galveston Wharf Company was actually loading cars there that day. * * * They quit in the afternoon, according to my recollection, about 6:30 p. m. January 13th. The fire occurred that night. * * * Our force unloaded the vessel and put the shipment at convenient places on the wharfs as designated. * * * Relative to the time when we have placed our shipment at the designated places on the wharfs, * * * the Wharf Company may load out immediately. * * * The billing was already in the hands of the Wharf Company. * * * We do not require the Galveston Wharf

Company or the connecting railroad to give us a receipt before we permit them to move the shipment from the point we put it on the wharf. They just take it. * * * These shipments could have been loaded before 9:00 that night. * * * It is a fact that on this particular day this Concho ship unloaded, a large number of cars had been loaded by the Galveston Wharf Company. In every one of those instances they picked up the freight from where the Mallory Line had deposited it on its Pier No. 24, and took it to the cars, and we later got a receipt."

The witness testified that some recoopering was necessary, and that such had been done by 5:30; at that time all of this shipment was conditioned to go forward.

Albert J. Schulte, Chief Dock Clerk of the Mallory Steamship Company, testified that this particular shipment was carried to and placed on the designated place on the dock. That the broken packages were all recoop-
[fol. 110] ered and the packages okeyed and so marked, and the car load of sardines was ready to be put on the cars by 4:00.

E. E. Grossrean, General Manager of the Wharf Company, testified that the Wharf Company leased Pier Nos. 23, 24 and others, to the Mallory Line by written contract, and that at the time involved here the lease was in force, that the shipment in question was unloaded from that pier, and from that pier the Wharf Company, on that day picked up and loaded on cars 45 of checked freight and 16 straight car loads out of the cargo of the ship Concho. He further testified that "this cargo could have been loaded that night"; that the record indicated that the last labor forces knocked off approximately at seven.

The evidence, we think, sustains the trial court's finding that the place on the wharf where the sardines were placed was the proper place to unload them and that the place had been designated by the Wharf Company as the place for unloading them.

The evidence shows that after the shipment had been unloaded and placed on the wharf at that place the steamship company's service was ended, and that it was then in the line of service of the Wharf Company to pick up the sardines and put them on the cars of the Railway Company then waiting to receive them, some seventy or eighty feet

away. As we view it, delivery of the shipment was complete, the Wharf Company having been put in absolute and unconditional control of the shipment; in other words, an actual change of possession from the Steamship Company to that of the Wharf Company had occurred, nothing else remaining to be done, the broken packages having been recoopered and okeyed the whole shipment was then in a deliverable state at that time and place.

The above as to delivery of possession of the shipment seems to be sustained by both state and federal courts, under the facts of this case, whether the Wharf Company [fol. 111] was acting for itself or as agent for the delivering carrier. Encyclopedic Digest of Texas Reports, Civil Cases (Michie) Vol. 3, p. 286; Cyc. Vol. 10, p. 221, et seq.

The remaining and more difficult question to be determined is the legal liability of the Wharf Company for the loss.

The Wharf Company submits that it not being a party to the bill of lading and its service being performed on behalf of the connecting or delivering carrier in loading the shipment on the cars of such carrier, it is not a connecting carrier but only the agent of the carrier for whom it renders such service, and therefore not liable to the shipper for loss of the shipment by fire, though it had constructive possession of such shipment.

The trial court found that the Wharf Company is a chartered transportation company, owning the piers located on the Galveston Bay side of the island, about 51 miles of railroad trackage extending from the piers along and through its yards in Galveston to connections with the lines of railroad operating out of Galveston, including the Galveston, Harrisburg & San Antonio Railway Company, and that it owns and operates eight switch engines with necessary yard and engine forces. It seems to us that under the above finding of the trial court and the duties and services of the Wharf Company elsewhere stated, the Wharf Company would be a private corporation, under subdivision 72 of Article 1302, created for the purpose of the construction, operation and maintenance of terminal railways. Article 6549 of our statutes provides that "terminal railways shall have all of the rights and powers conferred by law upon railroads by Chapters 6 and 7 of this title", and states certain other matters pertaining to

such corporations, but the statute nowhere states its duties nor services to be rendered, nor its liabilities as in that of [fol. 112] railroads or carriers; nor does the statute, as we view it, prescribe the duties and liabilities of terminal companies in this state, nor that the remedies against them shall be the same as are prescribed by the common law. In Texas & Pacific Ry. Co. v. Henson, 132 S. W., 118, the Fort Worth Belt Railway Company was impleaded in the suit by the Texas & Pacific Railway Company. The Belt Railway Company owned several miles of railroad track and engines and its business was to intercept and transport cattle trains on their way to the stock yards at Fort Worth, and transport them over its own line to the stockyard. The services of the Belt Railway Company to the Texas & Pacific Railway Company were similar to those of the Wharf Company in the instant case. In that case the Supreme Court held that the Belt Railway Company was a transportation company and not a railroad company or a common carrier within the meaning of the statute quoted. We have not found that case discussed or in any way modified by the Supreme Court. Our Courts have uniformly held that terminal companies, belt line companies, and railroad companies performing a transfer, shifting or switching service, in the performance of such service are acting in the capacity as the transfer agent of the company for which the service is performed, and not in the capacity of a carrier or railroad company. Texas & Pacific Railway Co. v. Scoggin & Brown, 90 S. W. 521, by Judge Speer of the Ft. Worth Court; St. Louis S. W. Ry. Co. of Texas v. Jackson & Co., 118 S. W. 853, by Judge Bookout, for the Dallas Court; C. R. I. & G. Ry. Co. v. Young & Ball, 107 S. W. 127, by Judge Levy for the Texarkana Court; Rio Grande Ry. Co. v. Kraft & Medero, 212 S. W., 981, by Judge Higgins, for the El Paso Court; Lancaster v. Hollebecke, 235 S. W. 1115, by Judge Higgins, for the El Paso Court, and many others to which we might refer.

If the Wharf Company was serving in the capacity of transfer agent of the Railway Company, the principal and [fol. 113] connecting and delivering carrier, it follows that the delivery of the shipment to the Wharf Company was delivery to the Railway Company, the principal. But it would be immaterial as to the capacity in which the Wharf Company represented the Railway Company if it is like-

wise liable with the principal to the shipper of the sardines under the facts of the case. The rule as to the liability of an agent to a third party with whom there is no privity has been stated in different ways. One text writer tersely states it thus:

"The rule is, that an agent is personally liable to third persons for doing something which he ought not to have done, but not for not doing something which he ought to have done." Ewell's Evans on Agency, 329, 334.

Story on Agency, 309, and Sherman & Radfield, III, on Negligence, announce the same rule. In Labadie v. Hawley, 61 Tex., 177, after stating the above rule and referring, with approval, to a number of cases in which the rule is recognized, Judge Stayton refers with approval to a case which states the rule thus:

"The agent is also liable to third persons for his own misfeasance and positive wrong. But he is not, in general, liable to third persons for his own nonfeasance or omissions of duty in the course of his employment. His liability in these latter cases is solely to his principal, there being no privity between them and such third persons; the privity exists only between him and his principal."

In Eastin & Knox v. Texas & Pacific Railway Co., 99 Tex., 654, 92 S. W. 838, in a suit for damages in a cattle shipment case where the agent of the Railway Company refused to route the shipment as requested by the shipper from a point in Texas to their point of destination in Oklahoma, and damages resulted by reason of the longer haul, the agent was joined as defendant. In discussing the question of the liability of the agent Judge Gaines said: "Where the agent is empowered to perform a duty for his principal, and neglects to perform it, and damages accrue from the failure, the agent is not responsible, though the principal [fol. 114] may be". In that case the agent was held liable with the principal, because, as said in the opinion, the wrongful act that caused the damage was done by the agent in the prosecution of the principal's business. In other words, the agent did something he ought not to have done, an overt act, a positive wrong, rather than an omission of some service he should have performed in the course of his employment.

To apply the above rule to the facts of the instant case, if, as the trial court found, and as we believe, the Steamship Company had delivered the shipment to the Wharf Company, and the Wharf Company should have picked up the shipment of sardines and put them in the waiting cars of the Railway Company and failed to do so, such failure was an act of omission and not of commission of a positive wrongful act, and under the rule as above, would not be liable to the shipper.

We have not discussed nor tried to distinguish a number of cases to which we have been referred. To do so would extend the opinion beyond a reasonable length. The cases referred to in the opinion, we think, sustain the conclusions we have reached.

For reasons stated the case is reversed as to the Wharf Company, and the facts having been fully developed, judgment is here entered in favor of the plaintiffs below, American Grocery Company and others whose names appear elsewhere, against the Galveston, Harrisburg & San Antonio Railway Company, for the amount found by the trial court to be the damages sustained.

The Railway Company filed a cross-action against the Steamship Company and the Wharf Company asking judgment over against said Companies in the event the plaintiffs in the suit recovered against it.

We are therefore now called upon to consider the dis- [fol. 115] position which should be made of such cross-action.

From what has already been said it is obvious no liability over exists in favor of the Railway Company against the Wharf Company.

The ground of liability asserted in the cross-action against the Wharf Company is that the fire which destroyed the sardines was caused by the negligence of the Wharf Company.

It is stated in the printed argument of the Wharf Company as follows:

"The fire which damaged this property was not due to the negligence of any of the parties involved, as the record shows that any claim of negligence was withdrawn at the trial of the case."

And in the brief of the original plaintiffs it is stated:

"In the trial of the cause all parties waived any claim of negligence on the part of any one of the defendants."

We have searched the record and find nothing of record to substantiate these statements but the correctness thereof is not questioned by the other defendants in error.

In any event no evidence was offered in support of the allegation of negligence in the cross-action. Hence, the cross-action fails for want of any evidence to support the same. Therefore, judgment must also be rendered against the Railway Company upon said cross-action.

Reversed and rendered to conform to the rulings herein made.

A. M. Walthall, Associate Justice.

[File endorsement omitted.]

[fol. 116] In Supreme Court of Texas

App. No. 16678

Galveston Wharf Co.

vs.

G., H. & S. A. Ry. Co.

From El Paso Co., 8th Dist.

Order Granting Writ of Error—May 15, 1929

This day came on to be heard the appln. of plff. in error for a writ of error to the Court of Civil Appeals for the Eighth Dist., and the same having been duly considered, it is ordered that the appln. be granted and the writ of error issue as prayed for.

IN SUPREME COURT OF TEXAS

App. No. 16679

G., H. & S. A. RY. Co.

vs.

AMERICAN GROCERY Co.

From El Paso Co., 8th Dist..

ORDER GRANTING WRIT OF ERROR—May 15, 1929

This day came on to be heard the appln. of plff. in error for a writ of error to the Court of Civil Appeals for the Eighth Dist. and the same having been duly considered, it is ordered that the appln. be granted and the writ of error issue as prayed for upon the filing by applicant of a bond in the sum of $200.00 conditioned to pay the costs of this Court, the Court of Civil Appeals and District Court, payable to the adverse party as prescribed by law.

IN SUPREME COURT OF TEXAS

App. No. 16680

AMERICAN GROCERY Co.

vs.

G., H. & S. A. RY. Co.

From El Paso Co., 8th Dist.

ORDER GRANTING WRIT OF ERROR—May 15, 1929

This day came on to be heard the appln. of plff. in error for a writ of error to the Court of Civil Appeals for the Eighth Dist. and the same having been duly considered, it is ordered that the appln. be granted and the writ of error issue as prayed for.

[fol. 117] IN SUPREME COURT OF TEXAS

ORDER REFERRING CASE TO COMMISSION OF APPEALS—
Entered Oct. 7, 1929

October 7th, 1929.

The following thirty-nine cases were to-day referred to Section "B" of the Commission of Appeals for examination and report:

5423, G., H. & S. A. Ry. Co. et al. vs. American Grocery Co., El Paso County, 8th Dist. (and thirty eight other cases).

[fol. 118] COMMISSION OF APPEALS, SECTION B

No. 1138-5423

G., H. & S. A. RAILWAY COMPANY et al., Plaintiffs in Error,

vs.

AMERICAN GROCERY COMPANY et al., Defendants in Error

From El Paso County, Eighth District

OPINION—Filed March 12, 1930

There is only one question in this case: "In whose possession was the shipment in question at the time of the fire?", and it having been found as a fact, by the trial court and the Court of Civil Appeals, to have been in the Wharf Company, the Supreme Court is without authority to disturb such finding (Schley v. Blum, 85 Tex. 551), unless there be no evidence of sufficient probative force to sustain it (Joske v. Irvine, 91 Tex. 574), which means that the evidence must be of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it. Radley v. Knepfly, 104 Tex. 130; Bank v. Jones, 107 Tex. 624; Bock v. Fellman, 212 S. W. 635.

If there is conflicting evidence, the finding of the trial court and of the Court of Civil Appeals is final, and however much the Supreme Court might differ with those courts, it must abstain from assuming authority delegated

to them by the Constitution and laws of this state. T. & P. Ry. v. Levine, 87 Tex. 438.

This brings us to the naked question of whether there is, in the record, any evidence of probative force in support of the finding of fact made by the trial court and Court of Civil Appeals, that the shipment in question was in possession of the Wharf Company at the time of the fire, and in considering this question we must disregard all contradictory evidence and consider, by itself alone, the testimony [fol. 119] tending to sustain such finding. Wininger vs. Ry. Co., 105 Tex., 56; Cartwright v. Canode, 106 Tex. 507.

The Court of Civil Appeals made a full statement of the case (13 S. W. (2d) 983) and quoted some of the oral testimony tending to sustain their finding of fact.

In view of the Wharf Company's contention here that there was no evidence on the subject, we think it proper to supplement the statement of the Court of Civil Appeals.

Mr. Gossreau, General Manager of the Wharf Company, in speaking of his company's methods of handling the steamship's cargoes, testified, that as soon as there is a sufficient lot of goods deposited on the wharf, the labor forces of the Wharf Company are put to work under supervision of the check clerks to load such goods into cars.

"So far as the handling of the cargo is concerned, the first thing the Galveston Wharf Company does is to pick it up and load it in the cars. The Galveston Wharf Company picks up this cargo at Pier No. 24 and takes it to the cars for the account of the so-called Galveston Bay Lines, consisting of the I. & G. N., the M. K. & T., the G. C. & S. F. and the G. H. & S. A. Railways. If it is going over the G. H. & S. A., we pick it up and put it on the cars for the account of the G. H. & S. A. The G. H. & S. A. pays us for this in accordance with the loading charges under our Tariff No. 18.

"When this cargo was unloaded that day, our records show that during the day the Galveston Wharf Company loaded into cars 45 cars of checked freight and 16 straight carloads from the 'Concho'. The Galveston Wharf Company, between 8:30 and closing time that day, had loaded from Pier No. 24 out of the cargo of the 'Concho' this many cars. The Galveston Wharf Company did not begin as soon as the boat began. * * * We receive compensation for one service from the Bay Lines, and we receive

compensation for another service from the Mallory. When the boat comes in, the Mallory, in addition to the rental, in [fol. 120] accordance with Local Tariff No. 18, under Section 3, would be assessed as follows: 'Rates and rules governing the handling of traffic over the wharves and piers of the Galveston Wharf Company,' wharfage rates in cents per hundred pounds, except as otherwise provided, applying on import and coast-wise traffic inward. * * * We, of course, perform the additional service of switching the cars. After loading the cargo we switch the cars from the track of the Galveston Wharf Company to the line of the G. H. & S. A., and they pay for that service. * * * There is no receipt given for any freight handled for the Mallory Line until such a service has been actually performed. We don't give a receipt until we pick the cargo off their leased pier and load it on the cars. In the course of dealing there with the Mallory Line and the G. H. & S. A., we did not at any time render any service other than what I have detailed about picking it up and loading it on the cars on behalf of the G. H. & S. A., and the use of the piers to the Mallory. These are the only two services we render. These are the only two we get any compensation for. * * * The loading by the Wharf Company of the cars from this cargo into the cars of the Bay line is a good day's work. The ship knocking off at 5:30, it would take our forces a little after that to finish. The record indicated the last labor forces knocked off approximately at seven. * * * It has been the practice for many years that when the 'Concho' came in there with this cargo, it is unloaded on the wharf, and we pick it up and put it on the cars. The cargo we did pick up and load into the cars, and the G. H. & S. A. paid us for those cars under the tariff we have just referred to for the loading charge, and so did all other lines for whom service was performed. Now, if the fire had not occurred, and we had picked up this cargo of sardines and placed it in the cars, under the practice and course of dealing the G. H. & S. A. would have paid us for loading charge outlined in the tariff. When we give a re- [fol. 121] ceipt to the Mallory Steamship Company after we have checked the cargo and loaded it into the cars, we give it for the account of the interested Galveston Bay Line. Absolutely, we never give a receipt as of date or time prior to our picking up the cargo and loading it into the cars. It

is given only on the date the freight actually is picked up and loaded into the cars. * * * At the time this fire occurred in January, 1926, where a steamer of the Mallory Line docked and unloaded its cargo on Pier No. 24, after that cargo was unloaded on Pier No. 24, the first thing the Galveston Wharf Company did in reference to said cargo would be to pick up the cargo and place it in the cars for the account of the Galveston Bay Line concerned. That was the only thing the Galveston Wharf Company did with reference to the cargo, after it was put on Pier No. 24, except that after loading was accomplished, the cars would be switched to the respective rail line, and for this switching another charge was made, a switching charge. * * * Before the steamer arrived, the billing was furnished, according to the testimony of the Mallory Line, to the Galveston Wharf Company, and that is correct. When the billing was furnished our clerks made entries from billing into the check record book. This book was for the purpose of checking the freight as it was loaded. After we did that, we would send the billing to the interested rail line. * * * As to when the billing would be given in reference to the arrival of the ship, it would depend, usually it gets in a couple of days ahead of the arrival of the steamer. Sometimes it misses entirely, but that is unusual. As a rule it would be delivered to the railroad before the steamer arrived.

"At the time this fire occurred, the Mallory Steamship Company did not have any depot or other place for the reception of freight, or unloading of freight, or for receiving of out-bound freight, other than those piers there at Galveston. * * * That is the only place where they trans- [fol. 122] act their business of receiving freight and discharging freight, on these piers that they rent from us. * * * Of course, if we had anticipated that there would be a fire that night, I might have gotten extra employees and loaded those cars.

"The Galveston Wharf Company did not receive any compensation for rendering any service either to the steamship lines or rail lines or anyone else, except for picking up the cargo from Pier No. 24 and taking it to the cars, and then switching the cars, and the wharfage charge to the steamer. * * * I think the Galveston Wharf Company is recognized as a common carrier. I believe it

has been declared so by the Interstate Commerce Commission. We make the same reports to the Interstate Commerce Commission that other common carriers make. We have approximately fifty miles of trackage and operate some eight or ten engines. We own eight. We have our own crews, our own yard forces. We operate our own yards and anything that comes into the Galveston Wharf that is bound inland is handled by the Wharf Company to the junction of the connecting line. * * * I am sure it is the practice that at about the time of the departure of the 'Concho' on the present voyage 112, the bills of lading covering the shipments that are in that boat are forwarded immediately by United States mail to the Mallory Line at Galveston. The Mallory forces and our check clerk forces had connecting offices on Pier No. 25. These bills go down to the Mallory Line clerk, and he passes them to our clerk. We make the necessary entries and pass these bills to the interested line that is going to handle it out to Galveston. Now, as a rule, all the work had been accomplished before the arrival of the boat. Before the arrival of the boat we turn over the same way bills that are turned over to us to the connecting carriers. * * * When the boat got to Galveston, so far as I know there was no dif- [fol. 123] ference in handling of the 'Concho' on Voyage 112 from others. When that boat got to the pier and docked, the forces of the Mallory unloaded it. * * * They have electric conveyors, but the custom there is to place the cargo in certain places as much as possible. There is, in a general way at least, a kind of assigned territory there for different rail lines. The cars are spotted opposite in the same manner. The night before this boat got to Galveston, both the Galveston Wharf Company and the G. H. & S. A. should have known from the billing that there was a car of sardines on that boat destined for El Paso, routed over the G. H. & S. A., or S. P. Our forces are at liberty to begin the loading as soon as the freight is put on the wharf, but the practice is to wait until there is a sufficient amount deposited there to keep the labor busy. Otherwise it is not a paying investment. It is our privilege to begin loading as soon as it is put on the wharf, unless a hold order is put on some specific shipment, which happens only occasionally. So that as soon as freights were depos-

ited on the wharf by the forces of the Mallory, there was nothing to prevent our forces from immediately picking it up and trucking it to the cars. That was all left to the judgment and discretion of the Galveston Wharf Company's supervisor of forces on the docks. It was not a matter within the control of the Mallory Line. * * * We try to spot these cars that take out S. P. freight on the tracks that are most convenient to pick up the freight that goes out on that line. On the day of the fire these cars had been spotted in the usual manner, and the cars were there. As the freights were placed on the wharf by the Mallory Line, it was purely a matter of the Wharf Company to determine just how and when to load the particular shipment in the usual manner. * * * We had access to the billing. We knew its destination. I notice that the original bill of lading has a notation 'Rush with Tracer'. * * * A notation of that kind should be given some attention. It ought to be recognized. As to whether [fol. 124] on these assumptions that the Mallory Line did its duty and unloaded it, and the evidence showed that everything was all right by four o'clock and that shipment ought to have been loaded out, I cannot say. If such a notation appeared on the billing, it should have been recognized, it seems to me, and some effort made to get it out. I would have attempted to do it. The Galveston Wharf Company tries to do that way. * * * After this shipment had been placed at the designated point, you ask what else [illegible] the further handling of that shipment was there to be done by the Mallory. There was the coopering feature. After this had been O. K.'d and it was all right in every respect and deposited there by the Mallory Line, the next thing in order would have been the loading into the cars by our forces if it was ready to go. It is the Mallory Line's usual performance to deposit it on the floor, and it is picked up and loaded into the cars by the Galveston Wharf Company. As to the particular time it is picked up, that is wholly in control of the Wharf Company. After it had been placed, and it was O. K.'d to go, we were at liberty to pick it up and send it forward at any time we got ready, and it was not necessary for us to ask permission of the Mallory Line about it. Unless there is some special feature connected with it, as a hold order, the usual course is

to load it and get rid of it. So far as the actual physical handling of the shipment from the time it is put, and assuming that it is ready to go, that is under the control of the Wharf Company. The Mallory Line never has required, so far as that boat is concerned, for us to give them a receipt for what we picked up before we loaded it. If they had requested it, I am sure they would not have got it. * * * As to whether the giving of the receipt has anything to do with the picking up of the freight and moving it, the freight is moved and must be loaded into the cars before the receipt is given. Whether we generally get these receipts to the Mallory for two or three days afterwards depends. We endeavor to give them receipts as soon as we can. Of course a receipt cannot be given the [fol. 125] same day, because everybody is busy loading the stuff. We cannot double our forces just for that express purpose. Yes, we endeavor to handle the freights that are loaded during the daytime on the cars promptly and move them out promptly. If we get a car loaded that is going to the G. H. & S. A., if we have several, we try to wait until they are all loaded and make a cleanup in the movement. We make the endeavor to get them out that night to our connecting lines in time sufficient to have them put in their fast trains, so that they will get to destination without delay. * * * The railroads in turn move these shipments out of Galveston just as fast as they can. In the meantime the Mallory Line has no receipts. It gets its receipts the following day, or as soon thereafter as possible. In the meantime the freights are absolutely gone so far as the Mallory is concerned, and I think they depend upon the well-known integrity of the Wharf Company to see that the receipts are forthcoming. It is just a matter of confidence, but in the meantime the possession of the stuff is away from them and out of them. It has left their possession. * * * I think the record shows that on the day of the fire we had about 150 men at work. That was about the average force. We used them right along, because they had become efficient in the service and knew what was expected of them. * * * There is a decided difference in the handling on the Galveston Wharf Company's wharves and that on the Morgan Line. The freight on the Mallory

Line is deposited on the floor of the pier. The Morgan Line, in loading their ships at New York loaded them in a manner that will insure the different commodities coming out of that vessel and that will permit them, on its arrival at Galveston, to load direct into cars, and that is done with very efficient effect with the Morgan Line. With the Mallory Line we cannot do that, because in their loading scheme they don't load freight in the ships that will per- [fol. 126] mit of such. We have asked the Mallory Line to do that time and time again, but it seems impossible to get the New York end to work up to that efficiency. * * * This ship was unloaded on the first day, and the records will show that the Wharf Company did not entirely load it out on the cars. If we had had a sufficient force of men there, I do not think we could have loaded all the cargo on that day. We had the usual force, and the same labor at the Mallory as usual. * * * In this particular instance the usual handling, so far as the Wharf Company is concerned, for account of the Galveston Bay Lines was given. It is not a fact that the question of the saving of expense to the Wharf Company was the prime reason that these shipments were not all moved onto the cars that day. We load shipments, or load cargo from shipments, and have put in some overtime occasionally. We do that because we want to give dispatch to the stuff. I believe I have already stated that these loads have to get to connecting lines in sufficient time to be put into their trains. * * * Our failure to load out all of the cargo was not entirely to prevent overtime. A delivery to the connecting lines has considerable to do with it. Our switch engine forces have to be given a reasonable length of time to switch these cars. They have to get them together. You know they do not all go to one railroad. They have to make delivery to three different yards.

"The record shows that there were two other cars going over the Southern Pacific to El Paso that came out. I suppose the other cars had special rush orders on them. From the bill of lading it would indicate that this car had rush order on it. * * * As I stated before, these carloads are often placed on the wharf by the Mallory Line to insure a very short trucking on their part, cutting down their trucking expense. It is apparent that three cars of El Paso freight were placed on the wharf. At what point on the

wharf I am unable to say. I think the record shows that [fol. 127] our forces did pick up the two cars that came forward. There was no one else to pick them up. We were not just as much in possession of the third car there as we were of the two that came forward. Personally, I cannot say that there was any reason why the two cars were picked up and the one was left. There was no one connected with the Mallory Line that I know of that prevented us from picking up the third car. It is possibly so that if we had been willing to pay overtime there was no reason why this car could not have been loaded. As already stated, that carload was handled approximately in the same manner as all other cargo. We aimed to finish about seven o'clock, and apparently there was no rush order or other special request on this particular car, or I am confident the same would have been loaded. I do not know whether there was any rush orders on the two cars for El Paso. * * *

"I have stated that the Mallory Line had no other depot at Galveston. As to whether we have any other depot, where we pick up freight our property extends from Piers 10 to 41. The particular wharf where this unloading is done is not our depot. That particular wharf is the depot of the Mallory Line, allocated to it for the express purpose of handling inbound and outbound cargo. The Wharf Company had absolutely nothing to do with it. The allocacation was for the account of the Mallory Line. The Wharf Company was interested only in loading out the freight into cars and unloading cars destined to the Mallory Line northbound. The property is ours, but it is allocated to the Mallory Line. Our forces work there in the performance of the duties for the account of the rail lines, in picking up this stuff and loading into cars and unloading from cars, and placing in their northbound berths for loading into their steamers. Our clerks have offices there. We have representatives and clerks on every pier. They cover a certain territory where a similar service is performed for other steamship agents. As already stated, numerous times we load the stuff for account of the rail lines at that [fol. 128] pier as well as at other piers. They are all our piers and are all allocated to steamship agents. They are allocated to the steamship agents, so that they can unload there. That is what they pay us for. I cannot say we use it for our own good. It is a facility of ours from which we

are supposed to make money. Of course we do enjoy some revenue on the wharfage, but as already stated, it is a losing proposition on the handling of freight. * * * It is not true that when the Galveston Wharf Company's loading forces see a shipment placed out of the boat on that wharf, that is going forward, we regard that as notice from the Mallory Line that this stuff is here ready to go forward and pick it up. We would know that the freight is placed there for the purpose of loading into cars. Now, the usual practice is to pick it up when these carloads are made complete and load it into cars for account of the interested Galveston Bay Line. * * * The practice is that when it is found that such carloads are ready to go, when no exceptions are made by rail line representatives, or otherwise, that it is there for our forces to pick up for the account of the Galveston Bay Line, and load into cars. * * * As to the understanding at the time of this fire as to when the Galveston Wharf Company took possession, the general understanding was that the shipments are taken possession of when they are lifted from the floor of the pier and deposited in the cars by the Galveston Wharf Company's forces for account of the Galveston Bay Lines. * * * It is possible that this same train takes the Morgan Line freight. I could not say positively. I understand that the Morgan Line works at night."

Mr. Bertram, dock superintendent of the steamship company, testified, that the ship docked at Galveston at 8:15 a. m. on January 13, 1926, and berthed at the Wharf Company's Piers No. 24 and 25 and commenced discharging its cargo working approximately 250 men.

[fol. 129] "As soon as the vessel leaves New York the Mallory Line forwards the billings and storage plan of the shipment, by mail from its New York office to Galveston, on ship sailing Wednesday from New York, and this would reach Galveston Saturday or early Sunday morning. When we get this billing and storage plan in Galveston, the billing is entered into check-books by the check clerks of the Mallory Line, and then turned over immediately to the check clerk of the Galveston Wharf Company. This is all accomplished at least two days before the vessel gets to Galveston. This was done relative to this voyage. Two days before the 'Concho' arrived in Galveston we had

furnished the Galveston Wharf Company with the billing and tonnage of the storage plan, so that at the time the ship arrived the Galveston Wharf Company knew the contents of the vessel. * * * The information we furnished to the Wharf Company, which they had before the vessel reached Galveston, gave them full information relative to this particular shipment, its location on the vessel, its ultimate destination, S. P. to El Paso. We actually began unloading this ship about 8:30 a. m. January 13, 1926. We had completely unloaded the vessel that day at about 5:30 p. m., January 13, 1926. It is my recollection that this car of canned goods, of sardines, had been placed upon the wharf sometime between 2:00 and 3:00 o'clock in the afternoon. It is my impression that this shipment had been unloaded and placed on the wharf prior to 3:00 o'clock in the afternoon. As to who designates the place on carload shipments, it is understood and agreed that they be discharged opposite the part of the ship where they are stowed. A shipment stowed in the forward end of the ship is discharged opposite the forward end, and shipments in the aft end are discharged opposite the aft end. * * * This shipment was in the forward end, and it was discharged in that territory that was adjacent to the forward [fol. 130] end of the vessel. It was discharged adjacent to the railroad tracks. The Galveston Wharf Company has tracks onto the wharves. The tracks of the Galveston Wharf Company that lead from the wharf at the ship's side connect with the railroads out of Galveston. There is a connection track between the track of the Galveston Wharf Company leading to Piers Nos. 24 and 25 that immediately connects with the G. H. & S. A. Railway Company. This shipment was destined to leave Galveston over the G. H. & S. A. Railroad. Cars were placed for the loading of this shipment the night before the arrival of the vessel, on Tracks 1, 2, 3, 4, 5 and 6, is my recollection, and possibly 7, and these tracks are adjacent to the place where the freight of the forward end of the boat is unloaded. It is about 70 or 80 feet, probably, from the point on the wharf where we place the goods to the adjacent railroad tracks. When the goods are discharged on the wharf by the Mallory Line, the Galveston Wharf Company handles it from that point. The Mallory Line does not have anything to do with the loading of the cars. The Galveston Wharf Company loads

these cars. It has a bunch of men there for that purpose, and did on this occasion. The Galveston Wharf Company was actually loading cars there that day. There were 1081 tons in that boat. There were 206 tons of L. C. L. and 780 tons of car load. The Galveston Wharf Company did not finish the loading of this shipment on that date. They quit in the afternoon, according to my recollection, about 6:30 p. m. January 13th. The fire occurred that night. They loaded out on that day 206 tons of L. C. L. freight, and car-load freight amounting to 401 tons, I believe. That left there for loading next day, or whatever time they chose, 379 tons. I have had a great deal of experience loading freight from ship-side to cars. The Morgan Line also operates into Galveston. It was possible for the Galveston Wharf Company to unload all the freight we unloaded for them that day. They did not work continuously that day in unloading L. C. L. freight. They were [fol. 131] interrupted. They took the crew off that day to unload cars at the loading pier, so they were not at work continuously loading the shipment out that day. Had they kept the work up regularly, it could all have been loaded on the cars that day. Our force unloaded the vessel and put the shipments at convenient places on the wharves as designated. Assuming that there are no broken packages, we do no further handling of a shipment. The Galveston Wharf Company does. Relative to the time when we have placed our shipment at the designated places on the wharves, so far as the Mallory Line is concerned, the Wharf Company may load it out immediately. This shipment moved on through bill of lading from point of origin to El Paso. The billing was already in the hands of the Wharf Company. It knew the ultimate destination. We have nothing to do with the placing of the cars nor with the ordering of the cars in, but the Galveston Wharf Company does. * * * We generally get a receipt from the connecting line approximately two days, not sooner, after we have finished our physical handling of the shipment. We do not require the Galveston Wharf Company, or the connecting railroad, to give us a receipt before we permit them to move the shipment from the point where we put it on the wharf. They just take it. The car is not held until we get our receipt. In other words, they go ahead in han-

dling without reference to giving a receipt, and when they get to that order of business, they send us down a receipt. We do not demand any receipt before we let them have the freight. Relative to this car of sardines, we would have permitted the Galveston Wharf Company or the G. H. & S. A. Railway Company to remove the shipment from the point where we had placed it on the wharf without a receipt. In the usual and customary handling of freight over the wharf from the vessel, after we have placed a shipment at the designated point on the wharf, the only thing else, if anything, the Mallory Line has to do with the shipment is to repair the bad order packages. Assuming there are no bad order packages, we have nothing further to do with it. [fol. 132] There were some bad order packages in this shipment of fish. I would not say the number of cases, but there were a few cases that were broken and required fixing

"As I said, we got through unloading the vessel at 5:30 p. m. At that time the cars were in there on the tracks for loading out freight. I understand there were 70 cars. The trackage there would accommodate approximately 100 cars, probably more. There were enough cars there to take care of all the freight on this boat. I do not know how many were left over that night. The fire occurred sometime between 11:00 and 12:00 o'clock p. m.

"The Galveston Wharf Company uses their wharves for other purposes besides handling shipments from the Mallory Line. It is the rule for the Wharf Company not to work at night in loading cars, unless all shipments can be loaded before 9:00 o'clock that night. These shipments could have been loaded before 9:00 o'clock that night. They quit working about 6:30 p. m. and had not been working continuously during the day. I understand they had been working about twelve gangs of about twelve men to the gang, or about 144 or 150 men. There were other shipments in that boat destined for El Paso. There was a carload of coffee and a carload of wire. They were unloaded by the Mallory Line and put on the wharf in approximately the same location as the sardines. They were taken out that day by the Wharf Company and the railroad. They did not give any receipt for it before they moved it. They did not ask our permission whether they could move it or not. When we set it down there, they picked it up and took

it on. This third car they did not take up. We got no receipt after the other two cars destined for El Paso moved out, unless they were signed in the meantime. I am not familiar with that. I do not know what character of receipt was issued. I don't know of my own knowledge, but I did not get any receipt. * * * It is a fact that on this particular day this 'Concho' ship unloaded, a large number [fol. 133] of cars had been loaded by the Galveston Wharf Company. In every one of those instances they picked up the freight cars from where the Mallory Line had deposited it on its Pier No. 24 and took it to the cars, and we later got a receipt for each of those cars that were loaded from the Galveston Wharf Company as of that time. * * * In reference to the recoopering of these packages, it is true that in carload shipments the recoopering is done right on the spot. The recoopering on these particular packages had been accomplished by 5:30 p. m. It had been completed, according to my best recollection, somewhere before 4:00 o'clock. At 5:30 o'clock, when we ceased to work, so far as outward appearance of the packages was concerned, all of this shipment was in condition to go forward.

"In answer to Mr. Wright's question awhile ago, I stated that we always get a receipt from the Wharf Company. It is a fact that sometimes we are delayed and have to take the matter up through Mr. Rennie's office to get the receipts. We have been delayed in some instances as long as a week or ten days in getting the receipts. We do not depend on getting the receipts before letting the shipment go out of Galveston. We never hold the shipment up because we have no receipt. We never get a receipt before we let them put it in the car. The purpose of the receipt is to check against overs and shorts at destination. So, as a matter of custom which has prevailed at that place for many years, we have never deemed it essential to get a receipt from the Wharf Company before we let them have possession of the goods. The Mallory Line has no control whatever over the employees of the Wharf Company who handle these shipments from the place on the dock to the car. We give them no directions. We never undertake to do so. * * * I think the Wharf Company gives the Mallory Line these receipts in the name of the railroad company, connecting carrier, by the Wharf Company. In other words the Wharf Company gives the receipt in the

[fol. 134] name of the railroad. They sign on account of the railroad. If it is going over the G. H. & S. A. Railroad, they give it 'G. H. & S. A. Railway Company, by Galveston Wharf Company.' The employees of the Wharf Company do the receipting, I suppose, for the railroad. The Wharf Company does the receipting, but I am not clear as to whether they do it for the railroad or not. I have no receipts given to me for the cargo unloaded that day out of this ship. I have none of them here. I don't handle this myself. I know there was no receipt given by the G. H. & S. A. or the Galveston Wharf Company for any sardines. We did not hold it up because we did not have the receipt. We did not hold it up at all. While these sardines were on the wharf, they were policed by employees of the Mallory Line in part. They were not policed by any railroad police."

Mr. Schulte, chief dock clerk for the steamship company, testified:

"I remember the arrival of the Steamship 'Concho' in Galveston on the morning of January 13th, 1926. I was there and had something to do with the placing of the freight on the dock. I was at work on that day. My duties are to see that the freight is placed on the dock and ready for delivery to the Wharf Company. I look after and see that the clerks are there to check the L. C. L. freight to the dock. I have other duties on the dock. When I say check L. C. L. freight on the dock, I mean we have check clerks who check the freight. The freight comes out of the ship and is taken to the designated territories, and we have check clerks near where they put the L. C. L. to check them to the pile.

"I remember this shipment of sardines. It was unloaded from the boat that day and placed on the wharf. As you come out of the conveyor, it was placed south of the gang-way about 60 feet from the conveyor, I would judge. As you come out of the ship, you go west, and it was placed south of the gang-way, where we generally place carload shipments on the dock. We have an electric conveyor. As [fol. 135] soon as the shipment comes off the boat, it gets on that and is automatically carried to the designated place. This shipment was so placed on that day. Trucks came off the conveyor and took it to the pile and unloaded it in a

pile on the dock. I remember it was on dock in the early afternoon. I could not tell the exact time. I judge it was before 2:00 o'clock. This was a carload shipment. After we placed the shipment in the designated territory, that is all we have to do with it. If we have broken cases, we set them aside, and the Mallory Line coopers come along and put them into condition, and we are through with it, and it is ready for the Wharf Company to load out. The Wharf Company does the loading of the cars from the place we put it. We have no voice in saying when they shall do that. They do that at their own pleasure and convenience. Some of the packages were broken, not a large amount. They were put into condition that day. I would say that this particular carload of sardines was ready to be put on the cars before 4:00 o'clock. After that time we had nothing to do with it. The Mallory Line was through with it. As to whether any of the representatives of the Wharf Company or railroad company had examined this shipment, I say they had. When the damaged cases were recoopered, they put the O. K. mark on them after we recoopered them. This was done by a representative of the railroad. The railroad has more than one clerk on the dock. The man representing the railroad company that O. K.'d these packages represented the railroad, but I could not tell you what man. I know he represented the railroad. As to how I know, Mr. Reed is representative of the railroad, and his man was the man at the pile. Mr. Reed was there at this time. As to whether I saw Mr. Reed there, he was on the dock somewhere. I remember seeing him on the dock. All the railroads have a common representative there. Mr. Reed represents them as joint line inspector. Mr. Reed's man had O. K.'d this shipment and put their O. K. on it. The Mallory Line coopers do not recooper until Mr. Reed's man puts an O. K. on. They have [fol. 136] a stamp, and then the Mallory Line recoopers or nails up the cases and fixes up the cartons, whatever it is. A representative of the joint railroad interests stands around when men are recoopering and sees that it is done, and then stamps it. That was done in this case. They do not put an O. K. on anything but broken packages. The only movement of car-load freights that are in good condition is a placement on the wharf by the Mallory Line, and

it is taken up by the Wharf Company and carried on. That is all there is to it. When there is reconditioning to be done, then it has to be O. K.'d by a joint representative of the railroads when we get through recoopering. That had been done in reference to these broken cases. Mr. Reed is a joint line inspector employed by the railroads and represents the railroads on the dock. He is there as the joint representative of the Bay Lines, I think. The G., H. & S. A. Railroad is one of the Bay Lines. There are three different sets of clerks work on the dock. The Mallory Line has a set of clerks, the Wharf Company has a set of clerks, and the railroad company has a set of clerks. There are two kinds of labor on the dock, the Wharf Company labor and the Mallory Line labor. So far as the clerks are concerned, it is divided into three classes. The labor is what moves the freight. The clerks check it. The Mallory Line places the shipment on the dock and the Wharf Company picks it up. This car-load of sardines was ready to go forward from the point where it had been placed by the Mallory Line by 4:00 o'clock in the afternoon. After that time the Mallory Line had their coopers on the dock. After this particular shipment had been reconditioned and was there in position, there was no other labor relative to it that was to be done by the Mallory Line. * * * Yes, I have something to do with the handling of the billing. It is sent from the post office to the city office, and then to the dock to me. I separate it, and we write our books. As we go along, the Wharf Company, as a rule, comes and gets the billing. The billing is turned over to them when we [fol. 137] finish. As a rule, they generally follow us along. We have adjoining offices on the wharf. When we get through handling this billing, which comes by mail from New York, we pass it on to the check clerks of the Wharf Company. This is done from one to two days before the arrival of the steamer. The Galveston Wharf Company and the G., H. & S. A. Railway Company, prior to the arrival of this vessel to port, had notice that there was a car load of sardines, destination El Paso, Texas, because they had the billing on it. I got my information that the G., H. & S. A. Railway Company had notice of this, because we had turned the billing over to the Wharf Company's clerks, and they generally, as a rule, write the billing right after we

turn it over to them, then when they finish they sand it out to the railroad. That is generally done the day before the arrival of the steamer. That is the practice. This has been done time and time again, and I am assuming that they followed the customary practice. There was no different method of handling the billing on this car than we usually did on others. It was all done the same way.

"I had something to do with getting receipts from the Wharf Company for freights. When these receipts finally get to me, whenever that may be, they are executed by the Galveston Wharf Company. The receipts we get for the shipments come from the Wharf Company and are signed, 'Galveston Wharf Company'. We do not get these receipts before the freight is taken off. We permit them to load the freight into the car without taking a receipt. We do not hold the car in Galveston until we get the receipt. There was a time when it would be, may be, a week after the arrival of the freight and placement on the dock by us before we got a receipt. Here lately they have been doing better, sometimes two or three days. We never get receipts for shipments prior to the loading into the cars, and we have never required that they give us receipts before they move the freight. * * *. It is a fact that [fol. 138] when this billing comes before the boats arrive, and our check clerk gets it, we then turn it over to the check clerks of the Wharf Company. It is a fact that the Wharf Company's clerks enter a record of these shipments in that billing on the books, just like the Mallory Line. * * * It is not a fact that if the Wharf Company had begun to move these sardines on this platform that evening, they would have checked those sardines. We do not check to know what we have delivered. As to whether we depend on the Wharf Company to check, we place them on the dock and consider that our delivery. * * * In this particular shipment there were a lot of carloads out of the 'Concho' loaded by the Wharf Company into cars on this particular day. Yes, we may have gotten receipts later for each of those cars. In the course of business we would have gotten receipts for them, and these receipts would have been dated as of the time the Galveston Wharf Company took those carloads off the wharf and took them to the cars. * * * The receipt would not show the time the Galveston Wharf Company took the freight off the wharf

and took it to the cars. It would show the date it loaded it out, and we never get a receipt from the Galveston Wharf Company showing that they received the goods any time before the loading date. * * * Assuming, in the regular and ordinary handling of this business as it has been customarily conducted for many years between the Mallory Line and the Wharf Company and the railroads, if this shipment had been put in the cars and gone out of Galveston, we never would have received any receipts from the railroad company. The only receipts we would get would be from the Wharf Company. I know the method of handling what is called package freight coming in off the boats.

"When and after the goods are loaded on the cars, we get a receipt, and we do not get a receipt until the goods are loaded on the cars. We did not get any receipt with reference to this shipment of sardines."

The above excerpts, we think, sustain the finding of fact, that delivery to the Wharf Company was complete and it [fol. 139] was in absolute and unconditional control of the shipment, and it was of no further concern to the steamship company. It is true that Mr. Gossreau did also testify that the steamship company handled the salvage from the fire, but that was only one of the many facts and circumstances in evidence to be considered and weighed in finding the ultimate fact; its effect was only to produce a conflict in the evidence which was solved against the Wharf Company by the trial court. It was not, of itself, a predominant and controlling circumstance, but like all others must have been given its proper consideration, the trial court being the judge of the credibility of the witnesses and the weight to be given to their testimony.

"It is true that the Wharf Company would give receipt to the Steamship Company, several days after cargoes were loaded, but this receipt would always be dated, not as of the time the steamship company unloaded and turned the goods over to it, but as of the time they were loaded onto the railroad's cars; such receipt, therefore, is not a controlling fixing of the precise time when the Wharf Company's responsibility began, because it had possession and responsibility from the moment the steamship company surrendered possession to the Wharf Company and until the latter turned the goods over to the railroad.

The trial court concluded as a matter of law, under the facts found, that the Wharf Company alone was liable to plaintiffs for the loss sustained, but the Court of Civil Appeals held that said company was only the transfer agent of the Railway Company and had possession of the destroyed goods, as such agent, and, therefore, reversed the trial court's judgment against the Wharf Company and rendered it against the Railway Company.

It is unnecessary for us to decide whether or not the Wharf Company is a common carrier, for the purposes of this case; it is in any event a transportation company, on [fol. 140] the authority of T. & P. Ry. Co. vs. Henson, 103 Tex., 598, and as such is liable to the plaintiff, or to the company for which it acts in the transportation of goods, for all damages resulting from its negligence in so doing.

"Agency" presupposes a directing principal and a directed agent under delegation of authority to the latter, either by contract, express or implied, or by operation of law, estoppel or ratification. Calvin vs. Blanchard, 101 Tex., 231; Milwaukee Bank vs. City Bank, 103 U. S. 668; Elliott on Contracts, Sec. 2832.

An agent is one acting for another in the transaction of some lawful business. Williams vs. Moore, 58 S. W. 953; Gibson vs. Gray, 43 S. W. 922. The agent is the alter ego—the other self—of the principal, and his authority is of the character bestowed upon him by the principal. Mechem on Agency, Sec. 278.

The uncontradicted proof shows the Wharf Company to be an independent actor, under no control of and subject to no directions from the Railroad Company; it exercided its own judgment as to when and how it would do the loading onto the cars. During the day of January 13, 1926, the Wharf Company actually loaded out some 45 cars of the Concho's freight, all of which was done as best suited its convenience; it employed and discharged its own help and fixed their hours of labor and the manner in which they worked.

On the other hand, the Railroad Company had a sufficient number of cars waiting to take and forward to destination the entire cargo, since the night before, and would have done so but for the Wharf Company's failure to move them onto the dock for that purpose. The Railroad Company was in no manner at fault.

We therefore conclude that the Wharf Company alone [fol. 141] is liable, and recommend that the judgment of the Court of Civil Appeals be reversed and that of the District Court be affirmed.

Joseph Ryan, Judge.

No. 5423

G., H. & S. A. Ry. Co. et al., Plaintiffs in Error,

vs.

American Grocery Co. et al., Defendants in Error

The judgment of the Court of Civil Appeals is reversed, and that of the District Court affirmed, as recommended by the Commission of Appeals.

C. M. Cureton, Chief Justice.

March 12, 1930.

[File endorsement omitted.]

[fol. 142] In Supreme Court of Texas

No. 5423, No. 1138

G., H. & S. A. Ry. Co. et al.

vs.

American Grocery Co. et al

From El Paso Co., 8th Dist.

Judgment on Judge Ryan's Opinion—Entered March 12, 1930

This cause having been referred to the Commission of Appeals for their examination and report and said Commission having reported in a written opinion by Hon. Joseph Ryan, Judge of Section "B," that there was error in the judgment of the Court of Civil Appeals but no error in that of the District Court, and recommending that the judgment of the Court of Civil Appeals be reversed and that of the District Court be affirmed, and said report to-

gether with the record in the cause having been duly considered, and the judgment as recommended by the Commission of Appeals having been approved by the Court, it is therefore ordered, adjudged and decreed that the judgment of the Court of Civil Appeals be reversed and the judgment of the District Court be in all things affirmed. That the American Grocery Company, a corporation, Charles L. Pomeroy Company, a corporation, The H. Lesinsky Company, a corporation, F. S. Ainsa Company, Inc., a corporation, Joseph Rehin, doing business under the name and style of Western Grocery Company, Adolph Nasits, doing business as Nasits Sales Company, Max Franklin and Harry Goodman, doing business under the name and style of Franklin & Goodman, and C. H. Lawrence, and the Galveston, Harrisburg & San Antonio Railway Company and the Mallory Steamship Company, do have and recover of and from the Galveston Wharf Company and its surety, Globe Indemnity Company, the amount adjudged in the District Court together with all costs in this behalf expended in this Court, the Commission of Appeals and Court of Civil Appeals, and this decision be certified to the District Court for observance.

[fol. 143] IN SUPREME COURT OF TEXAS

[Title omitted]

MOTION FOR REHEARING OF AMERICAN GROCERY CO.—Filed March 27, 1930

Preliminary Statement

The judgment of this court is in favor of the American Grocery Company against the Galveston Wharf Company. All parties to this litigation admit that the American Grocery Company is entitled to recover against either the Mallory Steamship Company, the Galveston Wharf Company, or the G., H. & S. A. Railway Company. The American Grocery Company desires to collect its judgment from someone of the three defendants, but it is filing this motion for rehearing for the reason that it realizes that this is a case involving an interstate shipment, that this case is con-

trolled by the federal decisions and the Interstate Commerce Act and that probably the Supreme Court of the United States has jurisdiction because of the federal question, as indicated by the Supreme Court of the United States in the cases of Georgia F. & A. R. R. Co. vs. Blish Milling Co., 241 U. S. 190, 60 L. Ed. 948, and Southern Ry. Co. vs. Prescott, 240 U. S. 632, 60 L. Ed. 836.

In view of the fact that this Honorable Court, through the Commission of Appeals, has held that American Grocery Company, the plaintiff in the trial court, is entitled to recover against the Galveston Wharf Company upon the grounds of negligence, and in view of the fact [fol. 144] that the American Grocery Company waived all claims of negligence, it is fearful that the Supreme Court of the United States may disturb the decision of this Court against the Galveston Wharf Company upon negligence not claimed but abandoned, and it is filing this motion for rehearing to protect its rights.

First Assignment of Error

The court erred in overruling the Second Assignment of Error contained in the American Grocery Company's application for writ of error and in holding that the Mallory Steamship Company was not in possession of the shipment at the time of the loss and damage by fire, for the reason that under the undisputed evidence there had been no delivery by the Mallory Steamship Company to the Galveston Wharf Company, but said shipment was still in the possession of the Mallory Steamship Company as a common carrier.

Second Assignment of Error

The Court erred in overruling the Fifth Assignment of Error contained in the Application for Writ of Error of American Grocery Company and in failing to hold that the shipment in question at the time of the loss and damage by fire was in the actual possession of the G., H. & S. A. Railway Company, the evidence showing that the shipment was in the possession of such railway company.

Third Assignment of Error

The Court erred in overruling the First Assignment of Error contained in the brief of the American Grocery Company and in holding that the trial court did not err in rendering judgment in favor of the Mallory Steamship Company on plaintiff's cause of action, for the reason that the undisputed evidence showed that the shipment in question was in the possession of the Mallory Steamship Company.

Fourth Assignment of Error

The Court erred in overruling the second assignment of error contained in the brief of the American Grocery Company and in effect holding that the trial court did not [fol. 145] err in rendering judgment in favor of the Mallory Steamship Company on plaintiff's cause of action, because under the undisputed evidence and the laws and decisions of the United States of America at the time of said loss and damage by fire said shipment was in the possession of the Mallory Steamship Company and the Mallory Steamship Company was liable to the plaintiff for such loss and damage, and the question of such liability is a federal question, to be determined under the statutes and decisions of the United States, and the judgment of this honorable court in favor of the Mallory Steamship Company on plaintiff's cause of action is a denial to the plaintiff of its rights on the federal question under the Interstate Commerce Act, the amendments thereto and the decisions of the federal court, including the United States Supreme Court.

Fifth Assignment of Error

This court erred in overruling the Fourth Assignment of Error contained in the American Grocery Company's Brief and in holding that the trial court did not err in rendering judgment in favor of the G., H. & S. A. Railway Company on plaintiff's cause of action, for the reason that under the undisputed evidence, at the time of the loss and damage by fire such shipment was in the possession of the G., H. & S. A. Railway Company, and the question of its liability presents a federal question, to be determined under

the Interstate Commerce Act, the laws of the United States of America and the decisions of the federal court, including the Supreme Court of the United States.

Sixth Assignment of Error

The Court erred in holding that the trial court's finding that at the time of the loss and damage by fire the possession of the shipment involved in this case had passed from the Mallory Steamship Company to the Galveston Wharf Company, because under the undisputed evidence at the [fol. 146] time of said loss and damage by fire the shipment was in the possession of the Mallory Steamship Company, and the question as to whether the possession of such shipment had passed from the Mallory Steamship Company to the Galveston Wharf Company presents a federal question, under the Interstate Commerce Act and the amendments thereto, and the decisions of the federal courts, and the holding of this honorable court against the American Grocery Company upon its cause of action against the Mallory Steamship Company is a denial to the American Grocery Company of its rights under the Interstate Commerce Act and the decisions of the United States Supreme Court thereunder.

Seventh Assignment of Error

This Honorable Court erred in holding that there had been a delivery of the shipment in question at the time of the fire by the Mallory Steamship Company to the Galveston Wharf Company, because in the bill of lading issued by the Mallory Steamship Company there was a provision requiring the Mallory Steamship Company to deliver the shipment to the next carrier in the route to destination, and the Galveston Wharf Company was not a carrier named in the bill of lading, the carriers named in the bill of lading being the Mallory Steamship Company and Southern Pacific Railway Company, which included the G., H. & S. A. Railway Company, and the question as to whether there had been a delivery to another carrier en route to destination under the terms of the bill of lading was a federal question controlled by the Interstate Commerce Act and decisions of the federal courts, and the hold-

ing of this Honorable Court that there had been a delivery by the Mallory Steamship Company to the Galveston Wharf Company was a denial of the rights of said Galveston Wharf Company under said federal question.

Eighth Assignment of Error

The Court erred in holding that the American Grocery Company, plaintiff in the trial court, was not entitled to [fol. 147] recover the amount of the loss and damage to the shipment in question from the G., H. & S. A. Railway Company, for the reason that under the undisputed evidence the possession of the shipment had passed from the Mallory Steamship Company to the Galveston Wharf Company; the G., H. & S. A. Railway Company was liable as a connecting carrier to the plaintiff, and the question as to whether a connecting carrier is a federal question under the Interstate Commerce Act, the amendments thereto and the federal decisions.

The attorneys of record for the Galveston Wharf Company are Thompson, Knight, Baker & Harris and Geo. S. Wright, of Dallas, Texas. The attorneys of record for the Mallory Steamship Company are Turney, Burges, Culwell & Pollard, of El Paso, Texas, and the attorneys of record for the G., H. & S. A. Railway Company are Kemp & Nagel, El Paso, Texas, and Baker, Botts, Parker & Garwood, Houston, Texas.

Wherefore American Grocery Company prays that the judgment of this court in its favor against the Galveston Wharf Company upon the grounds of negligence be set aside and that judgment be rendered in its favor against Mallory Steamship Company as a carrier, but if it be not entitled to such judgment, then to a judgment against the G., H. & S. A. Railway Company as a connecting carrier, and if it be not entitled to such judgment, then for a judgment against the Galveston Wharf Company as a common carrier, and for relief, general and special.

Fryer and Cunningham, Attorneys for American Grocery Company.

[File endorsement omitted.]

[fol. 148] IN SUPREME COURT OF TEXAS

[Title omitted]

MOTION FOR REHEARING OF GALVESTON WHARF CO.—Filed March 27, 1930

Preliminary Statement

The honorable Commission of Appeals, in the opinion adopted by the Supreme Court, held that the Galveston Wharf Company was liable because of negligence in this case when the record shows that all parties abandoned all claims of negligence. We feel sure that this Honorable Court has overlooked the abandonment of negligence by all parties. On page 4 of the Brief of the Galveston Wharf Company, in the statement of the nature and result of the suit, appears this statement:

"All allegations of negligence against the Wharf Company in several particulars are not copied for the reason the question of the negligence of the Wharf Company was waived by all parties at the trial of the case."

The American Grocery Company, the plaintiff in the trial court and in whose favor this Honorable Court rendered judgment, on page 7 of its brief, stated:

"In the trial of the cause all parties waived any claim of negligence on the part of any of the defendants."

On page 1 of the Mallory Steamship Company's brief, the following statement is made:

"The statement as to the nature and result of this suit as contained in the brief of Galveston Wharf Company is correct."

(This is an adoption of the statement of the Galveston Wharf Company in its statement of the nature and result of the suit to the effect that all claims of negligence were [fol. 149] abandoned.)

On page 1 of the brief of the G., H. & S. A. Railway Company there appears the following statement:

"The nature and result of the suit as stated in the brief for the Galveston Wharf Company and in the brief of the

defendant in error, American Grocery Company, is adopted by the G., H. & S. A. Railway Company."

(The adopted statement contains the statement that all claims of negligence were abandoned on the trial of the case.)

The Honorable Court of Civil Appeals' opinion states that the statements were made in the briefs of both Galveston Wharf Company and American Grocery Company that all parties abandoned all claims of negligence and that the correctness of these statements is not questioned.

The only two questions brought to this Honorable Court for decision in the briefs of any of the parties are:

First. At the time of the fire had the shipment passed from the possession of the Mallory Steamship Company to the Galveston Wharf Company?

Second. If the possession had passed from the Mallory Steamship Company to Galveston Wharf Company, then was the Galveston Wharf Company liable as a connecting carrier?

If the possession had passed from the Mallory Steamship Company to the Galveston Wharf Company, then was the Galveston Wharf Company liable as a connecting carrier?

If the possession had not passed from the Mallory Steamship Company, all parties admitted that the Mallory Steamship Company would be liable as a carrier, which is the liability of an insurer, regardless of negligence.

If the possession had passed from the Mallory Steamship Company to the Galveston Wharf Company and the Galveston Wharf Company held the shipment as a connecting carrier, then it would be liable as an insurer—that is, regardless of negligence.

If, however, the Galveston Wharf Company did not hold the shipment as a carrier, it could only be liable for negligence, and as all claims of negligence were abandoned there [fol. 150] could be no liability placed upon the Galveston Wharf Company for negligence, and it could not be held liable in this case unless it should be held that it was a connecting carrier. The Honorable Commission of Appeals in its opinion, on page 11, after holding that there was

some evidence to support the judgment of the trial court and the Court of Civil Appeals that the possession had passed from the Mallory Steamship Company to the Galveston Wharf Company, then said:

"It is unnecessary for us to decide whether or not the Wharf Company is a common carrier, for the purpose of this case: It is in any event a transportation company, on the authority of T. & P. Railway Company vs. Henson, 103 Tex. 598, and as such is liable to the plaintiff or to the company for which it acts in the transportation of goods for all damages resulting from its negligence in so doing."

The court then proceeds to hold the Wharf Company liable for negligence, notwithstanding the fact that all claims of negligence were abandoned by all parties to this cause. In view of the holding of the Court of Civil Appeals that all claims of negligence were abandoned by all parties, if negligence could be an issue, the Galveston Wharf Company would be entitled to have the issue of negligence passed upon by that court. The Court of Civil Appeals could and might determine that issue in favor of the Galveston Wharf Company.

We respectfully submit to this Honorable Court that if the Galveston Wharf Company is liable in this case it could only be liable upon a holding that it was a connecting carrier, liable as an insurer, and this question this Honorable Court has not passed upon but has rather indicated that the Galveston Wharf Company was a transportation company, as indicated by the Supreme Court of Texas in T. & P. Ry. Co. vs. Henson, 103 Tex. 598.

In the Henson case, the Supreme Court of Texas, speaking of the Fort Worth Belt Terminal Railway Company, performing the same character of service as was performed by the Galveston Wharf Company in this case, said:

[fol. 151] "Our conclusion is that the Fort Worth Belt Railway Company is a transportation company within the meaning of the statute quoted and that when it carries the cars of another company, loaded with its livestock, from its intersection with such other company to the stock yard at Fort Worth and it fails to exercise proper care in the carriage or handling of such livestock it becomes liable to the plaintiff, or to the company for which it acts in the trans-

portation of livestock, for all damages resulting from its negligence in so doing."

Again, the court said:

"It may be doubtful whether the Fort Worth Belt Railway is a railroad company in the broad sense of these terms or a common carrier, but that it is a transportation company we have no doubt."

This is the authority upon which the opinion of the Honorable Commission of Appeals in this case says that the Galveston Wharf Company is in any event a transportation company and liable for its negligence, and it is upon this authority that this Honorable Court has held the Galveston Wharf Company liable for negligence when all claims of negligence are abandoned. As a matter of fact, all claims of negligence were abandoned in this case so that the parties involved in this litigation could obtain a decision of the appellate courts upon two questions: First, had the possession of the goods at the time of the fire passed from the Mallory Steamship Company to the Galveston Wharf Company? Second, if it had passed from the Mallory Steamship Company to the Galveston Wharf Company, did the Wharf Company have the strong liability of a connecting carrier—that is, an insurer, or did it only have the liability for its failure to exercise ordinary care, such as is the liability of a transportation company or a transfer agent?

[fol. 152] This case involves interstate commerce and is controlled by the Interstate Commerce Act, the Cummings Amendment, the Carmack Amendment, and other amendments to the Interstate Commerce Act, and the decision of the question as to whether possession had passed from the Mallory Steamship Company to the Galveston Wharf Company, and the decision of the question as to whether the possession, if any, of the Galveston Wharf Company was that of a carrier and an insurer present federal questions, giving jurisdiction to the Supreme Court of the United States, and we respectfully submit that the parties litigant to this cause are entitled to have both of these federal questions passed upon directly by the last court of resort of Texas.

First Assignment of Error

This Honorable Court erred in holding in its opinion that the Galveston Wharf Company was liable for negligence as a transportation company because all claims of negligence had been abandoned.

Second Assignment of Error

This Honorable Court erred in rendering its opinion in holding that the Galveston Wharf Company was liable in this case for negligence as a transportation company because there — no claims presented in briefs or arguments before this Honorable Court that the Galveston Wharf Company had been guilty of negligence, and there was no evidence introduced showing or tending to show any such negligence.

Third Assignment of Error

This Honorable Court erred in rendering judgment against the Galveston Wharf Company in favor of the plaintiff, American Grocery Company, and in holding that the Galveston Wharf Company was liable for negligence, because under the Interstate Commerce Act and the amendments thereto, including the Cummings Amendment, the question of the liability of the Galveston Wharf Company either as a transportation company or as a carrier is a federal question, controlled by the authority of the federal gov- [fol. 153] ernment and under the decisions of the federal courts, including the Supreme Court of the United States, in the case of Missouri Pacific Ry. Co. v. Neynolds-Davis Grocery Company, 268 U. S. 366, 69 L. Ed. 1,000, decided on May 25, 1925. The Galveston Wharf Company in this case was not a connecting carrier and was not liable to the plaintiff for the loss and damage by fire to the property sued for and the decision of this Honorable Court against the Galveston Wharf Company is a denial to the Galveston Wharf Company of its rights under the Interstate Commerce Act and its amendments and the decisions of the federal courts.

Fourth Assignment of Error

This Honorable Court erred in holding that at the time of the fire the shipment described in plaintiff's petition in

the trial court had passed from the possession of the Mallory Steamship Company to the possession of the Galveston Wharf Company, for the reason that this suit involved a shipment in interstate commerce from a point in one state of the United States to a point in another state of the United States, and under the authority of the Interstate Commerce Act and its amendments, including the Cummings Amendment, the question as to whether the possession of the property damaged by fire had passed from the Mallory Steamship Company to the Galveston Wharf Company, was a federal question, controlled by the authority of the Interstate Commerce Act and its amendments and the decisions of the United States Supreme Court, and the holding of this Honorable Court that such possession had passed from the Mallory Steamship Company to the Galveston Wharf Company was a denial to the Galveston Wharf Company of its rights under the Interstate Commerce Act and the decisions of the federal court under the same, and said decision of this Honorable Court is in conflict with the decision of the United States Supreme Court in the Clayton Case, 173 U. S. 346, 43 L. Ed. 725.

[fol. 154] Fifth Assignment of Error

This Honorable Court erred in overruling the First Assignment of Error contained in application for writ of error of the Galveston Wharf Company and holding that the shipment in question in this case at the time of the loss and damage by fire was in the possession of the Galveston Wharf Company, because the undisputed evidence shows that at the time of said loss and damage by fire said shipment was not in the possession of the Galveston Wharf Company in any capacity.

Sixth Assignment of Error

This Honorable Court erred in overruling the Second Assignment of Error contained in said application for writ of error and in holding that at the time of the loss and damage by fire the shipment in question was in the possession of the Galveston Wharf Company in any capacity, for the reason that the undisputed evidence shows that at the time of said loss and damage by fire to said shipment the

time had not arrived, in the ordinary course of business, for the Galveston Wharf Company to have lifted such shipment from the Mallory Steamship Company's pier.

Seventh Assignment of Error

This Honorable Court erred in overruling the Third Assignment of Error in said petition for writ of error contained and in holding that the shipment in question was in the possession of the Galveston Wharf Company, because under the undisputed evidence the possession of said shipment was with the Mallory Steamship Company.

Eighth Assignment of Error

This Honorable Court erred in overruling the Fifth Assignment of error contained in said application for writ of error and in holding that the Galveston Wharf Company, if liable to the plaintiff, was not entitled to recover upon its cross action against the Mallory Steamship Company, be-
[fol. 155] cause under the undisputed evidence the Mallory Steamship Company had agreed to indemnify the Galveston Wharf Company from any loss, and under the written contract introduced in evidence if the Galveston Wharf Company was liable to the plaintiff the Mallory Steamship Company was liable to the Galveston Wharf Company.

Ninth Assignment of Error

This Honorable Court erred in rendering judgment in favor of the plaintiff against the Galveston Wharf Company and in overruling the first assignment of error contained in the brief of Galveston Wharf Company because under the undisputed evidence the shipment in question was not in the possession of Galveston Wharf Company as a common carrier and there was no claim or proof of any negligence on the part of the Galveston Wharf Company.

Tenth Assignment of Error

This Honorable Court erred in overruling the second assignment of error in the brief of the Galveston Wharf Company and in rendering judgment against the Galveston Wharf Company in favor of the plaintiff for the reason

that the undisputed evidence shows that the Galveston Wharf Company was not a party to the contract of the carriers sued upon by the plaintiff and that the shipment described in plaintiff's petition at the time of the fire was not in the possession of the Galveston Wharf Company but was in the possession of the Mallory Steamship Company.

Eleventh Assignment of Error

This Honorable Court erred in overruling the claim of the Galveston Wharf Company upon its cross action against the Mallory Steamship Company, for the reason that under the undisputed evidence there was a contract between the Galveston Wharf Company and the Mallory Steamship Company under which the Galveston Wharf Company was not to be responsible for loss or damage to any shipment on the piers leased by the Galveston Wharf Company to the Mallory Steamship Company or being [fol. 156] handled over said piers, and said Court erred in overruling the Sixth Assignment of Error in the Brief of the Galveston Wharf Company.

Twelfth Assignment of Error

This Honorable Court erred in overruling the Eighth Assignment of Error contained in the brief of the Galveston Wharf Company and in holding that the trial court did not err in overruling the motion of the defendant Galveston Wharf Company for a judgment in favor of the plaintiff against the Galveston Wharf Company and the Mallory Steamship Company with a proviso that the judgment should be satisfied first out of the property of the Mallory Steamship Company, and, second, out of the property of the Galveston Wharf Company, for the reason that under the evidence there was an understanding between the Mallory Steamship Company and the Galveston Wharf Company that the Galveston Wharf Company should not be responsible for the loss and damage involved in this case but that the Mallory Steamship Company should be responsible for the same.

Thirteenth Assignment of Error

This Honorable Court erred in overruling the Thirteenth Assignment of Error contained in the Brief of the Gal-

veston Wharf Company and in holding that the trial court did not err in paragraph 7 of the findings of fact to the effect that all the work to be done relative to said shipment by the Mallory Steamship Company had been fully completed and performed by four o'clock on the afternoon of January 14, 1926, and that thereafter, having so made such placement, the Mallory Steamship Company had nothing to do with the further moving or handling of said shipment, for the reason that said finding is not supported by the evidence, in that the evidence shows that under the course of dealing it was the duty of the Mallory Steamship Company to check with the Galveston Wharf Company said carload of sardines at the time the Galveston Wharf [fol. 157] Company would pick up and load it into the cars.

Fourteenth Assignment of Error

This Honorable Court erred in overruling the Sixteenth Assignment of Error contained in the brief of Galveston Wharf Company, and in holding that the trial court erred in its holding that as a matter of law the Mallory Steamship Company made the delivery of the shipment in question by the placement thereof on the wharf of the Galveston Wharf Company, at the point designated for the receipt thereof, and that at the time of the destruction of said shipment by fire same was in the possession of the Galveston Wharf Company as a common carrier.

Fifteenth Assignment of Error

This Honorable Court erred in overruling the Seventeenth Assignment of Error contained in the brief of the Galveston Wharf Company and in failing to hold that the trial court erred in paragraph 2 of its conclusions of law, to the effect that the Mallory Steamship Company delivered said shipment in the course of transit and that the handling of the shipment by the Galveston Wharf Company was an integral part of the transportation from the point of origin to the final destination thereof, for the reason that under the undisputed evidence the Galveston Wharf Company had no connection with the shipment as a common carrier, it was employed by the G. H. & S. A. Railway Company to pick said shipment up from the wharf and place it in the cars of said company, that under such

employment it had not taken possession of the shipment or exercised any dominion or control over the same.

Sixteenth Assignment of Error

This Honorable Court erred in overruling the Nineteenth Assignment of Error in the brief of the Galveston Wharf Company and in failing to hold that the trial court did not err in paragraph 3 of its conclusions of law, to the effect that at the time of the damage to said shipment said shipment was actually in possession of the Galveston [fol. 158] Wharf Company, for the reason that there was no evidence that at the time of said loss and damage said shipment was actually in the possession of the Galveston Wharf Company.

Seventeenth Assignment of Error

This Honorable Court erred in overruling the Twentieth Assignment of Error in the Brief of the Galveston Wharf Company and in failing to hold that the trial court erred in paragraph 3 of its conclusions of law, to the effect that the contract between the Galveston Wharf Company and the Mallory Steamship Company was not an indemnity contract, but if it was an indemnity contract it was void.

Nineteenth Assignment of Error

This Honorable Court erred in overruling the Twenty-first Assignment of Error contained in the brief of the Galveston Wharf Company and in rendering judgment against the defendant, Galveston Wharf Company, and in failing to hold that the trial court erred in its holding that the Mallory Steamship Company had made delivery of the shipment in question to the Galveston Wharf Company, and that the Galveston Wharf Company was liable as a common carrier for the loss and damage by fire to the property described in plaintiff's petition for the reason that the Interstate Commerce Act and its amendments, and under its authority as fixed by the decisions of the United States Supreme Court, controls a shipment such as is involved in this case under the bill of lading sued upon, and that by virtue of said laws there was no liability on the part of the Galveston Wharf Company as a common carrier.

Twentieth Assignment of Error

This Honorable Court erred in rendering judgment against the defendant Galveston Wharf Company for the reason that this was an interstate shipment, controlled by the Interstate Commerce Act and its amendments, and under the said act as construed by the Supreme Court of the United States the question of the delivery from the Mallory Steamship Company to the Galveston Wharf [fol. 159] Company and the question as to the liability of the Galveston Wharf Company as a carrier are federal questions, controlled by the Interstate Commerce Act and the federal decisions, and the rendition of judgment herein against the Galveston Wharf Company and the overruling of the assignments of error of the Galveston Wharf Company constitute a denial to the Galveston Wharf Company of its rights under said Interstate Commerce Act and the decisions of the United States Supreme Court.

Twenty-first Assignment of Error

The bill of lading issued in this case was a uniform bill of lading prescribed by the Interstate Commerce Commission under the Interstate Commerce Act of Federal Congress, and under its terms it obligated the Mallory Steamship Company named in the bill of lading to transport the property described in said bill of lading and to deliver said property to another carrier on the route to said destination. Carriers named in said bill of lading were as follows: Mallory Steamship Company and Southern Pacific Railway Company. (The G. H. & S. A. Railway Company was a part of the Southern Pacific System.) The question as to whether this shipment at the time of the fire had, under this bill of lading, been delivered by the Mallory Steamship Company to another carrier on the route to the destination was a federal question to be determined under the Interstate Commerce Act, and the decisions of the United States federal courts. This Honorable Court erred in holding that there had been a delivery of said shipment by the Mallory Steamship Company to the Galveston Wharf Company, and by such holding denied to the Galveston Wharf Company a valuable right under said federal question.

The attorneys of record for the American Grocery Company are Fryer & Cunningham, of El Paso, Texas. The [fol. 160] attorneys of record for the Mallory Steamship Company are Turney, Burges, Culwell & Pollard, of El Paso, Texas, and the attorneys of record for the G. H. & S. A. Railway Company are Kemp & Nagel, of El Paso, Texas, and Baker, Botts, Parker & Garwood, of Houston, Texas.

Wherefore Galveston Wharf Company prays that the judgment of this Honorable Court heretofore rendered on the 12th day of March, 1930, be set aside, and that it be granted a rehearing and upon rehearing that judgment be rendered in this cause in favor of the Galveston Wharf Company, and for relief, general and special.

Thompson, Knight, Baker & Harris, Geo. S. Wright,
Attorneys for Galveston Wharf Company.

[File endorsement omitted.]

Service Waived. April 9, 1930, Submitted & Referred to Sec. "B", Com. of Appeals. Granted June 25, 1930.

[fol. 161] IN SUPREME COURT OF TEXAS

No. 5423

G., H. & S. A. RY. Co.

vs.

AMERICAN GROCERY Co.

From El Paso Co., 8th Dist.

ORDER GRANTING MOTIONS FOR REHEARING—Entered June 25, 1930

Nos. 9082 and 9083

It is ordered by the Court that the motions for rehearing herein be granted, and all previous orders set aside as made in said cause, and the cause withdrawn from the Commission of Appeals and advanced.

[fol. 162] IN SUPREME COURT OF TEXAS

No. 5423

G., H. & S. A. RY Co. et al., Plaintiffs in Error,

vs.

AMERICAN GROCERY COMPANY et al., Defendants in Error

From El Paso County, Eighth District

OPINION REVERSING JUDGMENT OF COURT OF CIVIL APPEALS—
Filed March 18, 1931

This is a suit by the American Grocery Company and others against the Mallory Steamship Company, Galveston-Harrisburg & San Antonio Railway Company and the Galveston Wharf Company, for the value of a carload of sardines destroyed by fire while the same was in transit to that company as consignee. The shipment originated in Seaport, Maine, the initial carrier being the Seaport Navigation Company, which issued a through bill of lading, shipper's order, notify American Grocery Company, El Paso, Texas. Under the bill of lading this merchandise was routed: Seaport Navigation Company, Mallory Steamship —and G. H. & S. A. Railway Company, the Galveston Wharf Company not being a party to the bill of lading.

The case was tried before the court without a jury and the trial court rendered judgment in favor of the American Grocery Company and others against the Galveston Wharf Company for the value of the shipment and in favor of the G. H. & S. A. Railway Company and the Mallory Steamship Company. An appeal was made to the Court of Civil Appeals and the judgment of the trial court was reversed as to the Wharf Company and judgment rendered in favor of the American Grocery Company against the G. H. & S. A. Ry. Co. 13 S. W., (2d) 983. Writs of error were granted by the Supreme Court to review the judgment of the Court of Civil Appeals.

[fol. 163] The case was referred to Section B of the Commission of Appeals and the Commission, through Judge Ryan, in its original opinion reversed the opinion of the

Court of Civil Appeals and affirmed the judgment of the trial court. 25 (2d) S. W. 588.

Upon motion for rehearing the Supreme Court withdrew the case from Section B, set aside the judgment rendered therein, and retained same for its decision.

We refer to the opinions of the Court of Civil Appeals and Commission of Appeals for a more detailed statement of the nature of the case.

For convenience the companies involved will be designated as the Steamship Company, the Railway Company and the Wharf Company.

At the very threshhold of this case we are met with this question: In whose possession was the shipment of goods at the time of the fire? Let us briefly review the testimony bearing upon this phase of the case. The evidence is undisputed that the shipment arrived at Galveston on the morning of January 13, 1926, in the S. S. "Concho". At Galveston the Steamship Company leased from the Wharf Company certain piers which the Steamship Company used in its freight business. Pier 24 was used as the pier on which the Steamship Company unloaded inbound shipments coming to Galveston. Other piers were used by the Steamship Company for loading outbound shipments.

At the time in question the Railway Company, named in the bill of lading as the delivering carrier, had no tracks which connected with the unloading depot of the Steamship Company at Pier 24. The Wharf Company had tracks which made connection with the railway line at a point removed from Pier 24. The Wharf Company filed tariffs with the Interstate Commerce Commission which fixed a charge for two services to be rendered to the carrier in two respects: (1) The Wharf Company would check with the [fol. 164] clerks of the Steamship Company and pick up the shipments from Pier 24 destined to inland points in Texas, truck these shipments to the cars adjacent to Pier 24, load the cars; and (2) switch the cars to the respective rail-carriers named as delivering carriers in the bill of lading.

During the day of January 13, 1926, the Steamship Company unloaded a very large number of shipments from the S. S. "Concho" and placed them on Pier 24. Among these was the shipment to the Grocery Company. During that day the Wharf Company picked up from Pier 24 sixty-six

cars of freight which had been unloaded by the Steamship Company from the S. S. "Concho" and placed these sixty-six cars of merchandise in cars for various railroads, but at seven o'clock on the evening of January 13, 1926, when the Wharf Company closed its operation for the day the shipment involved in this suit with other shipments was still on Pier 24, where it had been placed by the Steamship Company and where it was destroyed by fire on the night of January 13, 1926.

On the day of the 13th this shipment needed recoopering, because of some damaged packages. This recoopering was completed somewhere around 4 o'clock in the afternoon of the 13th day of January, 1926. The unloading began at 8:30 a. m. on said date and was completed by the Mallory Line at about 5:30 p. m. of the same day.

Some of the witnesses for the Steamship Company testified, in effect, that so far as the Steamship Line was concerned, it had completed the delivery of the shipment. Witnesses for the Wharf Company testified, in substance, that the Steamship Company unloaded the shipment on the pier and it was taken possession of by the Wharf Company when the shipments are lifted from the floor of the pier and deposited in the cars by the Wharf Company forces for account of the Galveston Bay Lines. That the local freight is held on the pier and delivery is made to the consignees by the Steamship Company forces from these piers. That [fol. 165] is the only place where it transacts the business of receiving freight and discharging freight on the piers rented from the Wharf Company.

Mr. Gossreau, General Manager of the Wharf Company, testified:

"There is no receipt given for any freight handled for the Mallory Line until such a service has been actually performed."

Again he says:

"Our forces are at liberty to begin the loading as soon as the freight is put on the wharf but the practice is to wait until there is a sufficient amount deposited there to keep the labor busy. Otherwise it is not a paying investment. It is our privilege to begin loading as soon as it is put on the wharf, unless a hold order is put on some specific shipment,

which happens only occasionally. So that as soon as freights were deposited on the wharf by the forces of the Mallory there was nothing to prevent our forces from immediately picking it up and trucking it to the cars. That was all left to the judgment and discretion of the Galveston Wharf Company Supervisor of forces on the docks. It was not a matter within the control of the Mallory Line".

He further says:

"The Mallory Line never has required so far as that boat is concerned for us to give them a receipt for what we picked up before we loaded it."

Again he says:

"It gets its receipts the following day or as soon thereafter as possible. In the meantime the freights are absolutely gone so far as the Mallory is concerned and I think they depend upon the well known integrity of the Wharf Company to see that the receipts are forthcoming. It is just a matter of confidence but in the meantime the possession of the stuff is away from them and out of them. It has left their possession."

More testimony along this line could be quoted but we think the above sufficient to illustrate our views.

The trial court in its findings of fact, among other things, found:

(1) That the shipment in question was in the exclusive possession of the Wharf Company; and

(2) That it was not in possession of either the Railway Company or the Steamship Company.

The Wharf Company contends that it should be held under the evidence introduced that, as a matter of law, no [fol. 166] delivery of the shipment in controversy was made by the Steamship Company to the Wharf Company. To this contention we cannot agree. We think the evidence raises a fact issue to be determined and the trial court found that a delivery had been made by the Steamship Company to the Wharf Company.

Under the state of the record, we do not think it can be said, as a matter of law, that there was no evidence of any probative force to sustain the findings of the trial court. It

can only become a question of law when the facts and circumstances are such that but one reasonable conclusion can be drawn thereform. Wininger vs. Ry. Co., 105 Texas, 56; 143 S. W. 1150; Radley vs. Knepfly, 104 Texas, 130; Cartwright vs. Canado, 106 Texas, 507, 171 S. W. 696.

This brings us to the consideration of another question: Was the Wharf Company a common carrier as defined by law and liable for the shipment destroyed by fire?

It is the contention of the Wharf Company that the service performed by it is such that it does not come under the definition of a common carrier; that it was not mentioned in the through bill of lading and by reason of the nature of its services and compensation paid therefor, it is merely an agent of the railroad lines.

The trial court found:

"That the Galveston Wharf Company is a chartered transportation Company, owning, in addition to the piers located on the Galveston Bay side of the island, about fifty-one (51) miles of railroad trackage, extending from said piers along and through its yards in Galveston to connections with the lines of railroad operating out of Galveston, including the Galveston, Harrisburg & San Antonio Railway Company. That said Galveston Wharf Company owns and operates eight (8) switch engines, providing therefor the necessary yard and engine forces.

"That it had on file with the Interstate Commerce Com- [fol. 167] mission and with the Texas Railroad Commission, duly promulgated tariffs covering its charges for the various services performed and to be performed by it. That it makes the regular reports to the Interstate Commerce Commission that are ordinarily made and required of all common carriers by railroads. That it has a general manager, superintendent of terminals, treasurer and the usual other officers as required and necessary in the conduct of that character of business.

"That its railroad tracks extend to and along the Pier 24, where the shipment in question had been unloaded from the steamship."

Mr. Gossreau testified as follows:

"I think the Galveston Wharf Company is recognized as a common carrier. I believe it has been declared so by the Interstate Commerce Commission."

We think the finding of the trial court finds ample support in the evidence as shown by the record.

That the Wharf Company is a common carrier as defined by the Acts of Congress of the United States, the statutes of this state and by both federal and state decisions is fully settled. Interstate Com. Act, Title 49, U. S. C. A., sec. 1, par. 3; sec. 6, par 13; Art. 10, Sec. 2, Constitution of Texas; Art. 1491, R. S. 1925; Art. 905 R. S. 1925; Washington et al. vs. Kuykendall, 245 U. S. 207, 72 L. ed 241; United States vs. Union Stock Yard Co., 226 U. S. 285, 57 L. ed. 226; Batchelder & Snyder Co. vs. Union Freight R. Co., 54 A. L. R. 616, (Petition for writ of certiorari denied by U. S. Sup. Ct., Nov. 21, 1927, 72 L. ed. 424); 48 Sup. Ct. Rep., 117; M. K. & T. Ry. Co. vs. Ward, 60 L. ed. 1213; Union Stock Yards Co. vs. U. S., 169 Fed. 404; U. S. vs. Northern Pacific Terminal Co., 181 Fed. 879; Ft. Worth Belt Ry Co. vs. U. S., 22 Fed. (2d) 795; Tap Line Cases, 58 L. ed. 1185; U. S. vs. Ramsey, 197 Fed., 144; S. P. Term. Co. vs. Interstate Com. Com., 55 L. ed. 310; K. C. S. Ry. Co. vs. Rosebrook-Josey [fol. 168] Grain Co., 114 S. W. (Civ. App.) 436; G. C. & S. F. Ry. Co. vs. Hanes, 4 S. W. (2d) (Civ. App.) 641; Mo. Pac. Ry. Co. vs. Wichita Groc. Co., 40 Pac. 899; People et al. vs. Public Service Co., 191 N. Y. S. 636; 198 App. Div. 436, affirmed 134 N. E. 590 and certiorari denied by U. S. Sup. Ct., 42 S. Ct. 314, 258 U. S. 621, 66 L. ed. 795; Nation vs. San Antonio S. Ry. Co. 283 S. W. (Com. App.) 157; Burd vs. San Antonio S. Ry. Co., 261 S. W. (Com. App.) 1021. Many others could be cited.

In the case of United States vs. Union Stock Yard & Transit Company, 57 Law Ed., 226, it was contended there, as here, that by reason of the peculiar service rendered by the Union Stock Yard & Transit Company that it was not a common carrier and controlled by the provisions of the Interstate Commerce Act. In passing upon this question, the Supreme Court of the United States said:

"Together, these companies, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the act, and perform services as a railroad when they take the freight delivered at the stock yards, load it upon cars, and transport it for a substantial distance upon its journey in interstate commerce under a through rate and bill furnished by the trunk line carrier, or receive it while it is still in progress in interstate

commerce upon a through rate which includes the terminal services rendered by the two companies, and complete its delivery to the consignee. They are common carriers because they are made such by the terms of their charters, hold themselves out as such, and constantly act in that capacity, and because they are so treated by the great railroad systems which use them. In Union Stock Yards Co. vs. United States, 94 C. C. A. 626, 169 Fed. 404, Mr. Justice Van Devanter (while a circuit judge), speaking for the court of appeals, said:

"'It's (the Stock Yards Company's) operations * * * [fol. 169] include the maintenance and use of railroad tracks and locomotives, the employment of a corps of operatives in that connection, and the carriage for hire over its tracks of all live stock destined to or from the sheds or pens, which, in effect, are the depot of the railroad companies for the delivery and receipt of shipments of live stock at South Omaha. The carriage of these shipments from the transfer track to the sheds or pens, and vice versa, is no less a part of their transit between their points of origin and destination than is their carriage over any other portion of the route. True, there is a temporary stoppage of the loaded cars at the transfer track, but that is merely incidental, and does not break the continuity of the transit any more than does the usual transfer of such cars from one carrier to another at a connecting point. And it is of little significance that the stock yards company does not hold itself out as ready or willing generally to carry live stock for the public, for all the railroad companies at South Omaha do so hold themselves out, and it stands ready and willing to conduct, and actually does conduct, for hire, a part of the transportation of every live stock shipment which they accept for carriage to or from that point, including such shipments as are interstate.'"

Article 10, Section 2 of the Constitution of the State of Texas, provides that——

"Railroads heretofore constructed or which may hereafter be constructed in this State are hereby declared to be highways, and railroad companies, common carriers."

We are referred to the case of T. & P. Ry. Co. vs. Henson, 103 Texas, 598, and other decisions as controlling

in this case. It must be kept in mind that this is a federal question and a determination thereof must be governed by federal decisions. In that case Chief Justice Gaines did not directly pass upon the question as to whether or not the Ft. Worth Belt Railway Company was a common car-
[fol. 170] rier. Recently in the case of Ft. Worth Belt Ry. Co. vs. United States, 22 Fed. Rep. (2d) page 795, the Circuit Court of Appeals passed directly upon the question and held that the Ft. Worth Belt Railway Company was a common carrier under the provisions of the Safety Appliance Act, as follows:

"By section 1 of the Act of March 2, 1903, the provisions of the Safety Appliance Act were so extended as to apply to 'all * * * cars * * * used on any railroad engaged in interstate commerce'. As the defendant uses its tracks to haul over them interstate shipments to and from their destination, it cannot plausibly be questioned that the defendant's lines constitute a 'railroad engaged in interstate commerce'. In behalf of the defendant it was contended that the prescribed penalty was not incurred by the movement in question, because no interstate traffic was involved in that movement. This contention is not sustainable, as it has been settled by authori-tive decisions that the penalty is incurred by moving on a railroad engaged in interstate commerce a car defectively equipped as the one in question, though at the time of such movement that car and others in connection with which it is moved are engaged exclusively in intrastate commerce. Southern Ry. Co. v. United States, 222 U. S. 20, 32 S. Ct. 2, 56 L. ed., 72; Southern Ry. Co. v. Railroad Commission of Indiana, 236 U. S. 439, 35 S. Ct. 304, 59 L. ed. 661."

It is earnestly contended, and the Court of Civil Appeals held, that the Wharf Company was merely an agent of the Railway Company, and, therefore, was not liable for the value of the shipment and the loss should be paid by the Railway Company. Let us briefly review the facts upon this issue:

Mr. Gossreau, General Manager for the Wharf Company, testified:

"At the time the fire occurred on January 13th the Galveston Wharf Company absolutely had done nothing to

[fol. 171] take possession of the shipment of sardines. They had not handled it in any way. At the time of the fire they had not begun to start the service they were going to be paid for by the G. H. & S. A."

The tariffs introduced show wharf tariffs chargeable to the Steamship Company and loading and switching charges chargeable to the railroad carrier. Mr. Gossreau further testified:

"Outside of the $5,000 a year the Mallory Steamship Company pays us for the rental of Pier No. 24 and others. We receive compensation for one service from the Bay Lines, and we receive compensation for another service from the Mallory. When the boat comes in, the Mallory, in addition to the rental, in accordance with Local Tariff No. 18, under Section 3, would be assessed as follows: 'Rates and rules governing the handling of traffic over the wharves and piers of the Galveston Wharf Company', wharfage rates in cents per hundred pounds, except as otherwise provided, applying on import and coastwise traffic inward."

He further testified:

"As to the understanding at the time of this fire as to when the Galveston Wharf Company took possession, the general understanding was that the shipments are taken possession of when they are lifted from the floor of the pier and deposited in the cars by the Galveston Wharf Company's forces for account of the Galveston Bay Lines."

He further testified:

"The local freight is held on the pier and delivery is made to the consignees by the Mallory Line's forces from these same piers. That is the only place where they transact their business of receiving freight and discharging freight, on these piers that they rent from us."

He further testified:

"At the time this fire occurred on January 13, 1926, the Mallory Line was exclusively using Pier No. 24."

He further testified:

[fol. 172] "It contains also wharfage charges covering freight passing over piers, which charge is assessed against the vessel or its owners."

Albert J. Schulte, Chief Dock Clerk and witness for the Steamship Company, testified that—

"It is a fact that the Wharf Company's clerks enter a record of these shipments in that building on the books, just like the Mallory Line. As to whether, after they do that on carload lots, whenever the Galveston Wharf Company gets ready to pick up a carload lot at Pier No. 24, and put it on a car, they take a copy of the billing, accompanied by a clerk of the Mallory, and check those carload lots as they pick them up and take them over to the car."

The Steamship Company claimed the right, under proper orders, to divert the shipment at any time prior to the actual loading by the Wharf Company into the cars of the Railway Company.

Mr. Bertram, a witness for the Steamship Company, stated that—

"If we had been confronted with a diversion or reconsignment of that shipment of sardines to some dealer in Greenville, Texas, if the American Grocery Company had filed a diversion or reconsignment, we would have endeavored to have a diversion. We would have reconsigned it for the accommodation of the consignee. After the goods had actually been loaded in the freight cars, and we had received the diversion or reconsignment order, the shipment would have been beyond our control."

The contract between the Wharf Company and the Steamship Company leasing to the latter the pier in question, provided that such pier would be leased by it and the evidence shows that on the night in question, at the time of the fire, this shipment of goods was being policed by the Steamship Company. It is undisputed that no part of the shipment had been loaded on the cars of the Railway Company.

[fol. 173] Another cogent reason why the shipment of goods had not been delivered to the Railway Company is

reflected in the fact, as shown by the uncontroverted evidence, that after the fire whatever remained of the cargo was salvaged by the Steamship Company.

The trial court further found that the goods had not been delivered to the Railway Company at the time of the fire. This finding, in our judgment, is fully sustained by the evidence.

The Court of Civil Appeals reversed that part of the judgment rendered by the trial court in favor of the American Grocery Company and others against the Wharf Company and rendered judgment in favor of the American Grocery Company and others against the Railway Company upon the theory that the Wharf Company was the agent of the Railway Company.

If the Court of Civil Appeals undertook to substitute its findings of fact for the findings of fact made by the trial court and render final judgment thereon, it would not be authorized to do so, if there was any evidence in the record to sustain the finding made by the trial court. Patrick vs. Smith, 90 Tex. 267, 38 S. W. 17; H. & T. C. Ry. Co. vs. Strycharski, 92 Tex., 1, 37 S. W. 415; Choate vs. S. A. Ry. Co. 91 Tex. 406, 44 S. W. 69.

However, as we construe the opinion of the Court of Civil Appeals, that court does not undertake to substitute its findings of fact for the findings of the trial court, but merely construed the legal effect of the evidence, considered as a whole, and held, as a matter of law, that the Wharf Company was the agent of the Railway Company and not liable for the shipment of goods destroyed by fire, and therefore reversed and rendered the cause. This ruling gives the Supreme Court the power to review the evidence. Marshburn vs. Stewart, 113 Texas, 518, 260 S. W. 565; Tweed vs. Western Union Tel. Co., 107 Tex. 247; Beck [fol. 174] vs. Texas Co., 105 Tex., 303.

The case of Missouri Pacific Railroad Company vs. Reynolds-Davis Grocery Company, 69 L. Ed. 1000, is cited as controlling in this case. That case was an action brought by Reynolds-Davis Grocery Company against the Missouri Pacific Railroad Company to recover for the loss of part of a carload of sugar shipped from Raceland, Louisiana, to Fort Smith, Arkansas, on a through bill of lading. The loss occurred within the city of Fort Smith while the

car was in the possession of the St. Louis-San Francisco Railroad.

The joint through rate covered delivery at the warehouse of the consignee. The bill of lading named Morgan's Louisiana & Texas Railroad & Steamship Company as the initial carrier, and the Missouri Pacific as the last of the connecting carriers. Its lines enter Fort Smith, but do not extend to the consignee's warehouse. It employed the St. Louis-San Francisco to perform the necessary switching service and paid it for such service. Under these facts, the Supreme Court of the United States held that the St. Louis-San Francisco Railroad was merely the agent of the Missouri Pacific.

The Supreme Court of Arkansas in its opinion rendered in the foregoing case, 257 S. W. p. 70, states the facts more fully as follows:

"The bill of lading evidencing the special contract under which the shipment in controversy was made, shows that the appellant was the last connecting carrier operating under that bill of lading. This was a through bill of lading from the nonagency station at Mathews, La., to Ft. Smith, Ark., in which the appellant undertook to make the delivery to the consignee at Ft. Smith. The Frisco Railroad Company was not named in this bill of lading as a connecting carrier, and the services it performed in the premises under its switching arrangements with the appellant were not as a connecting carrier, but purely and simply at the [fol. 175] instance, and as the agent, of appellant. The terms of the bill of lading control here. Under those terms the appellant is undoubtedly the terminal carrier, and bound itself under the terms of the contract to make the delivery, and it cannot shift its liability upon the shoulders of some other carrier or agency which was not in the contemplation of the parties to the contract."

What are the facts of this case? It is undisputed that the Steamship Company had leased certain piers from the Wharf Company for the purpose of unloading its freight; that the Wharf Company handled its cargoes and loaded it on the cars of the various railroad lines and then switched them from the Wharf Company to the railroad line receiving same. The testimony shows that if the Steamship Com-

pany should desire to divert the shipment before delivered to the railroad that it is authorized to do so. The trial court held that the delivery had not been made to the railroad and the testimony shows that it had not issued a receipt therefor. It is also shown that no part of this shipment had been loaded on the cars of the railroad. The General Manager for the Wharf Company testified that at the time of the fire it had done nothing to take possession of the shipment of sardines. At the time of the fire they had not begun to start the services they were going to be paid for by the railroad and he further testified that the general understanding was that the shipments are taken possession of when they are lifted from the floor of the pier and deposited in the cars by the Wharf Company's forces for account of the Galveston Bay Lines.

In the case of M. K. & T. R. Co. vs. Ward, 61 Law Ed., 1213, the Supreme Court of the United States held that—

"The purpose of the Carmack Amendment has been frequently considered by this court. It was to create in the initial carrier unity of responsibility for the transportation to destination. Atlantic Coast Line R. Co. v. Riverside [fol. 176] Mills, 219 U. S. 186, 55 L. Ed. 167, 31 L. R. A. (N.S.) 7, 31 Sup. Ct. Rep. 164; Northern P. R. Co. vs. Wall, 241 U. S. 87, 92, 60 L. Ed. 905, 907, 36 Sup. Ct. Rep. 493. And provisions in the bill of lading inconsistent with that liability are void. Norfolk & W. R. Co. v. Dixie Tobacco Co. 228 U. S. 593, 57 L. ed. 980, 33 Sup. Ct. Rep. 609. While the receiving carrier is thus responsible for the whole carriage, each connecting road may still be sued for damages occurring on its line; and the liability of such participating carrier is fixed by the applicable valid terms of the original bill of lading. The bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation."

The court in the same case further held as follows:

"For the purpose of fixing the liability, the several carriers must be treated, not as independent contracting parties, but as one system; and the connecting lines become in effect mere agents, whose duty it is to forward the goods under the terms of the contract made by their principal, the initial carrier. Atlantic Coast Line R. Co. v. Riverside

Mills, 219 U. S. 186, 206, 55 L. ed. 167, 182, 31 L. R. A. (N.S.) 7, 31 Sup. Ct. Rep. 164; Galveston H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 491, 56 L. ed. 516, 523, 32 Sup. Ct. Rep. 205."

See T. & P. Ry. Co. vs. Leatherwood, 63 L. ed. 1096. Burd vs. S. A. S. Ry. Co., 261 S. W. (Com. App.) 1021.

The case of Batchelder & Snyder Co. vs. Union Freight R. Co., 156 N. E. 698, 54 A. L. R. 616, involved the liability of a company engaged in delivering cars between freight terminals and private sidings and it was contended there, as here, that the company engaged in such switching services was not a common carrier. In that case Batchelder & Snyder Co. sued the Union Freight Railroad Company for damages to a shipment which was delivered to the defendant by one of the carriers and while in possession of [fol. 177] the defendant, Union Freight Railroad Company, the goods became injured or damaged and to recover the value thereof plaintiffs sued that company. This shipment consisted of a carload of pickled hams shipped by Hately Brothers Company from Chicago on a uniform order bill of lading, consigned to "Hately Brothers Company, Boston, notify Batchelder & Snyder Company, Boston," routed by New York Central and Boston & Albany railroads. The Union Freight Railroad Company was not mentioned in the through bill of lading. When the shipment reached Boston the Boston and Albany Railroad placed the car in possession of the defendant for delivery to the consignee. As stated, while in the possession of the defendant the alleged injury to the shipment occurred. The trial court held that the interstate transit ended with the acceptance of the car by the defendant on May 13th; that no contract between these parties existed upon the bill of lading and therefore denied plaintiff a recovery against the defendant. The Massachusetts Supreme Judicial Court in passing upon this question held:

"The defendant is a common carrier. See Union Freight R. Co. v. Winkley, 159 Mass. 133, 38 Am. St. Rep. 398, 34 N. E. 91; United States v. Union Stock Yard & Transit Co., 226 U. S., 286, 57 L. ed. 226, 33 Sup. Ct. Rep. 83. It received the car for transit on its line in Boston from the yards of the Boston & Albany Railroad to the plaintiff's unloading

platform at Constitution Wharf. Transit began when the car was received, and ended when it was 'set' at the specified place of delivery. Rice v. Hart, 118 Mass. 201, 19 Am. Rep. 433, and cases cited. New York, N. H. & H. R. Co. v. Porter, 220 Mass., 547, 108 N. E. 499. There was no intermediate point when and where the car was unloaded or when and where it was accessible to the plaintiff for any purpose. The defendant occupied throughout this period the position of a common carrier in control of the car and its contents. South Deerfield Onion Storage Co. v. New York, [fol. 178] N. H. & H. R. Co. 222 Mass. 535, 111 N. E. 367; P. Garvan v. New York, C. & H. R. R. Co. 210 Mass. 275, 96 N. E. 717; Michigan C. R. Co. v. Mark Owen & Co. 256 U. S. 427, 65 L. ed. 1032, 41 Sup. Ct. Rep. 554; McNeill v. Southern R. Co., 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722. It was, therefore, an insurer (Norway Plains Co. v. Boston & M. R. Co., 1 Gray, 263, 61 Am. Dec. 423; Chicago & N. W. R. Co. v. C. C. Whitnack Produce Co., 258 U. S. 369, 372, 66 L. ed. 665, 667, 42 Sup. Ct. Rep. 328, and cases cited."

The underlying principle of the Carmack Amendment and the amendments thereto is one of agency. When the initial carrier accepts goods for shipment it is treated as a through contract and all connecting carriers are agents of the initial carrier, and it is their duty to forward shipments under the terms of the contract made by the initial carrier. Each connecting carrier is the agent of all of the others. For the purpose of fixing liability the several carriers are treated not as independent contracting parties, but as one system. It is well settled that each connecting carrier is responsible for loss or injury inflicted during the transportation while the property is on its particular line. This statute gives the shipper any remedy he may have under the common law as recognized by the federal courts. He is not confined either to the initial carrier or to the connecting carriers for his satisfaction and he may join all the carriers in one suit for damages. Furthermore, he is not required to elect which one he will hold liable. In the suit of Missouri Pacific Railroad vs. Reynolds-Davis Grocery Company, supra, the plaintiffs sued the Missouri Pacific Railroad, the terminal carrier, for the damages sustained. This the law gave them the right to

do. In this case plaintiffs sued the Steamship Company as well as the Wharf Company as connecting carriers and the Railway Company as the delivering carrier. Under the law plaintiff could sue all of them, as was done in this case and the trial court could render judgment against the carrier liable for the loss or damages to the shipment of goods.

[fol. 179]

In the face of this record and the foregoing authorities it would be illogical to hold that the Wharf Company was merely the agent of the Railway Company and, therefore, not liable for the value of the shipment of goods destroyed by fire while in its possession. Logically it follows that the Wharf Company would be liable for the value of the shipment destroyed by fire.

The judgment of the Court of Civil Appeals is reversed and the judgment of the trial court is affirmed.

John H. Sharp, Commissioner.

The foregoing opinion is adopted as the opinion of the Supreme Court, and judgment will be entered in accordance therewith.

C. M. Cureton, Chief Justice.

[File endorsement omitted.]

[fol. 180] In Supreme Court of Texas

No. 5423

G., H. & S. A. Ry. Co. et al.

vs.

American Grocery Co. et al.

From El Paso Co., 8th Dist.

Judgment—Entered March 18, 1931

The opinion in this cause having been written by [illegible], Judge of Section "A", it is [illegible] that the opinion herein delivered be adopted

opinion of the Supreme Court, and that the following judgment be entered therein, as follows, to-wit:

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Eighth Supreme Judicial District and the original transcript in said cause being before the Court as well as the transcript showing the proceedings had in said Court of Civil Appeals and these having been duly considered, because it is the opinion of the Court that there was error in the judgment of the Court of Civil Appeals but no error in the judgment of the District Court, it is therefore ordered, adjudged and decreed that the judgment of the Court of Civil Appeals be reversed and the judgment of the District Court be in all things affirmed. That the plaintiff in the District Court, American Grocery Company, a corporation, Charles L. Pomeroy Company, a corporation, the H. Lesinsky Company, a corporation, F. S. Ainsa Company, Inc., a corporation, Joseph Rehin, doing business under the name and style of Western Grocery Company, Adolph Nasits, doing business as Nasits Sales Company, Max Franklin and Harry Goodman, doing business under the name and style of Franklin & Goodman, C. H. Lawrence, the Galveston, Harrisburg & San Antonio Railway Company and the Mallory Steamship Company do have and recover of and from the Galveston Wharf Company and its surety, Globe Indemnity Company, the amount adjudged in the District Court, together with all costs in this behalf expended in this Court and Court of Civil Appeals and this decision be certified to the District Court for observance.

[Fols. 181-199] Petition for rehearing of Galveston Wharf [illegible] covering 20 pages, filed April 2, 1931, omitted from this print. It was denied, and nothing more by order of [illegible] 24, 1931.

[Fols. 200 & 201] Petition for rehearing of American Gro[illegible] Co., covering 2 pages, filed April 2, 1931, omitted [illegible] this print. It was denied and nothing more by order [illegible] 24, 1931.

[illegible]—1139

[fol. 202] IN SUPREME COURT OF TEXAS

[Title omitted]

Order Overruling Motions for Rehearing—Entered June 24, 1931

It is ordered by the Court that the motions for rehearing herein by the deft. in error and Galveston Wharf Co. both be overruled.

[fol. 203] IN SUPREME COURT OF TEXAS

[Title omitted]

Præcipe and Agreement—Filed Sept. 1, 1931

Clerk of the Supreme Court:

You will please prepare certified copy of Transcript of the Record in the above cause and include in said record the following:

1. Plaintiff's First Amended Original Petition (Tr. 1 to 4).
2. Plaintiff's Trial Amendment (Tr. 18-19).
3. First Amended Answer of Mallory Steamship Co. (Tr. 5-13).
4. Supplemental Answer of Mallory Steamship Co. (Tr. 20-21).
5. GH&SA Ry. Co's First Amended Answer (Tr. 13-17).
6. Supplemental Answer of GH&SA Ry. Co. (Tr. 20).
7. First Amended Answer of Galveston Wharf Co. (Tr. 17-18).
8. Trial Amendment of Galveston Wharf Co. (Tr. 19).
9. Judgment of the Trial Court (Tr. 26-28).
10. Findings of Fact and Conclusions of Law filed with the Trial Court (Tr. 28-37).
11. Galveston Wharf Company's Assignments of Error (Tr. 44-51).
12. Plaintiff's Assignments of Error (Tr. 59-61).
13. Statement of Facts.
14. Judgment of the Court of Civil Appeals.
15. Opinion of the Court of Civil Appeals.
16. Order of Supreme Court granting writs of error.

17. Order of the Supreme Court referring case to Commission of Appeals, Sec. B.

18. Opinion of Commission of Appeals by Justice Ryan.

19. Order of Supreme Court reversing judgment of Court of Civil Appeals and affirming judgment of trial court as recommended by Commission of Appeals. (This is the first judgment of the Supreme Court.)

[fol. 204] 20. Motion for rehearing on said judgment filed by American Gro. Co., #9082.

21. Galveston Wharf Co's. Motion for Rehearing on said judgment, #9083.

22. Order of the Supreme Court granting rehearing Nos. 9082 and 9083, setting aside former orders and withdrawing cause from Commission of Appeals.

23. Opinion of Justice Sharp, with the adoption of it as the final opinion of the Supreme Court and order of the Supreme Court reversing the Court of Civil Appeals and affirming trial court's judgment.

24. Motion for rehearing of Galveston Wharf Company on said judgment.

25. Motion for rehearing of American Grocery Company on said judgment.

26. Order of the Supreme Court overruling said motions for rehearing.

The attorneys for the respective parties hereby agree that the certified copy of the transcript of record in the above case shall include the instruments set out above.

American Grocery Company et al., by Fryer & Cunningham, Its Attorneys. Mallory Steamship Company, by Turney, Burgess, Culwell & Pollard, Its Attorneys. G. H. & S. A. Railway Company, by Baker, Botts, Andrews & Wharton, J. H. Tallichet, Its Attorneys. Galveston Wharf Company, by Geo. S. Wright, Its Attorneys.

[File endorsement omitted.]

[fol. 205] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 2, 1931

The petition herein for a writ of certiorari to the Supreme Court of the State of Texas is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1318)

FILE COPY

FILED
SEP 24 1931
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 411

THE GALVESTON WHARF COMPANY ET AL.,
PETITIONERS,

vs.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF.

ALEX F. WEISBERG,
Counsel for Petitioners.

THOMPSON, KNIGHT, BAKER & HARRIS,
GEORGE S. WRIGHT,
Of Counsel.

(36,225)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 411

THE GALVESTON WHARF COMPANY ET AL.,
PETITIONERS,

vs.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

MAY IT PLEASE THE COURT:

The petition of the Galveston Wharf Company respectfully shows to this honorable court:

A.

Summary Statement of the Matter Involved.

The American Grocery Company and others sued the Mallory Steamship Company, the Galveston Wharf Company, and the Galveston, Harrisburg & San Antonio Railway Company in the State District Court at El Paso, Texas, to recover approximately

$6,000.00 on account of the loss at Galveston, Texas, on January 13, 1926, of a carload shipment of sardines by reason of a fire that occurred at Galveston, Texas, on that date. Plaintiffs' cause of action was based on a bill of lading prescribed by the Interstate Commerce Commission and covering an interstate shipment from the State of Maine to El Paso, Texas. The bill of lading called for the transportation of the shipment from a point in Maine to the City of New York over the Boston & Maine Railway Company and by water from the Port of New York to the Port of Galveston, Texas, by the Mallory Steamship Company and from Galveston, Texas, to the interior point, El Paso, by the G. H. & S. A. Railway Company. The bill of lading named the Boston & Maine Railway Company as initial carrier and the Mallory Steamship Company and G. H. & S. A. Railway Company. The Galveston Wharf Company was not a party to the bill of lading, and the undisputed evidence showed that it was not a party to the tariff covering the shipment and did not receive any part of the freight. The Boston & Maine Railway Company delivered the shipment to the Mallory Steamship Company at New York, and the Mallory Steamship Company transported the shipment in the Steamship "Concho," which arrived at Galveston on the morning of January 13, 1926 (Ex. I., R. 80A).

At Galveston the Mallory Steamship Company leased from the Galveston Wharf Company certain piers which the Mallory Steamship Company used in its freight business. Pier No. 24 was used as the pier on which the Mallory Steamship Company unloaded

inbound shipments coming to Galveston. Other piers were used by the Mallory Steamship Company for the loading of outbound shipments. In the lease contract between the Mallory Steamship Company and the Galveston Wharf Company was a provision to the effect that the Galveston Wharf Company should not be liable for any shipments passing through the piers leased by the Mallory Steamship Company (R. 81).

At the time in question the G., H. & S. A. Railway Company, named in the bill of lading as delivering carrier, had no tracks which connected with the unloading depot of the Mallory Steamship Company, the terminal carrier named in the bill of lading. The Galveston Wharf Company had tracks which made connection with the G., H. & S. A. Railway line at a point removed from Pier 24. The Wharf Company filed tariffs with the Interstate Commerce Commission which fixed a charge for the two services to be rendered the carriers, in two respects: First, the Wharf Company would check with the clerk of the Mallory Steamship Company the shipments and would pick up such shipments from Pier 24 destined to inland points in Texas, truck these shipments to cars adjacent to Pier 24, and load the shipments into the cars; second, switch the cars to the respective rail carriers named in the bills of lading (R. 57-59).

These tariffs, which were furnished to both the G., H. & S. A. Railway Company and the Mallory Steamship Company, provided that the Galveston Wharf Company should not be liable for loss and damage occurring to freight on the lines of the company, except for negligence. Under the undisputed evidence the

Wharf Company, under the custom and course of dealing on shipments coming by the Mallory Steamship Line to Galveston, such as the shipment involved here, would pick up the shipment from Pier 24, check the shipment with the clerk of the Mallory Line, and issue a receipt as of the day and hour it picked up the shipment from Pier 24 (R. 60-61) (Ex. D, R. 86D, Sec. C).

During the day of January 13, 1926, the Mallory Steamship Company unloaded a very large number of shipments from the Steamship "Concho" and placed them on Pier 24. Among these was the shipment of the American Grocery Company. During that day the Galveston Wharf Company picked up from Pier 24 sixty-six cars of freight which had been unloaded by the Mallory Steamship Company from the "Concho" and placed these sixty-six cars of merchandise in cars of the various railroads, but at 7:00 o'clock on the evening of January 13, 1926, when the Wharf Company closed its operations for the day, the shipment involved in this suit, with other shipments, was still on the platform at Pier 24, where it had been placed by the Mallory Steamship Company and where it was destroyed by fire on the night of January 13, 1926. If the fire had not occurred on the night of January 13, 1926, in the ordinary course of business on January 14th the Wharf Company would have checked this shipment with the clerk of the Mallory Steamship Company, picked up the shipment, placed it on trucks, and in due course would have issued a receipt to the Mallory Steamship Company as of the date and hour of the picking up of the shipment (R. 58-61).

On January 13th this shipment needed recoopering because of some damaged packages. The Mallory Steamship Company had recoopered the shipment and a representative of the delivering rail line, the G., H. & S. A., had O.K'd the recoopering under the existing custom, but the Galveston Wharf Company had no notice that the recoopering had been done and that it had been O.K'd by the railway line's representative and would not have known this until, in the ordinary course of business, on the following day, the day after the fire, when it would have proceeded to pick up the shipment from the pier.

At the time of the fire, the undisputed evidence showed the following:

1. The merchandise had not been checked by the joint representatives of the Wharf Company and the Steamship Company (R. 76) in accordance with the general custom in handling such shipments.

2. Under the mode of dealing between the parties the period had not been reached when it was the duty of the Wharf Company to issue a receipt for the goods to the Steamship Company (R. 45-46, 61-62).

3. After the damaged part of the shipment had been repaired by the Steamship Company, the Wharf Company was not afforded a fair opportunity, in the due and ordinary course of its business, to possess the goods.

4. The Steamship Company, by failure to give the Wharf Company notice that the damaged portion of the shipment had been repaired, impliedly agreed that

such notice might be acquired by the Wharf Company in due course of its business (R. 78-79).

5. The Steamship Company claimed the right, upon proper order, to divert the shipment at any time prior to the actual loading by the Wharf Company into the cars of the railway company (R. 47).

6. The goods were cared for and policed by the agents of the Steamship Company up to the time they were destroyed by fire.

7. The Steamship Company and the Wharf Company interpreted the mutual understanding existing between them as placing possession of the goods with the Steamship Company at the time of the fire, as the latter company, without protest from the former, assumed to and did handle on its own account the salvage of the goods which went through the fire (R. 76-77).

Upon the trial of the case in the State trial court all parties abandoned any claim of negligence against any of the defendants.

B.

Decisions of Courts Below.

The trial court rendered judgment in favor of the plaintiffs, the shippers, against the Galveston Wharf Company, holding, first, that at the time of the fire possession of the shipment had passed from the Mallory Steamship Company to the Galveston Wharf Company; second, that the Galveston Wharf Company

held the shipment as a carrier and was liable for its loss and damage by fire as an insurer, even though it was not guilty of negligence.

The case was appealed to the Court of Civil Appeals, an intermediate Texas appellate court, at El Paso, Texas, and that court held that at the time of the fire possession of the shipment had passed from the Mallory Steamship Company to the Galveston Wharf Company, but that the Galveston Wharf Company was not a party to the bill of lading, and it held the shipment merely as the agent of the G., H. & S. A. Railway Company and was not liable except for negligence, and as no negligence was shown, the court reversed the judgment of the trial court (R. 88).

By application for writ of error the case was taken to the Supreme Court of Texas, where several opinions were written through the Commission of Appeals, a court created for the purpose of assisting the Supreme Court in disposing of its docket. The first opinion rendered by the Commission of Appeals, by Justice Ryan, held that possession of the shipment had passed from the Mallory Steamship Company to the Galveston Wharf Company and that the Galveston Wharf Company was liable because of negligence.

A motion for rehearing was filed calling the court's attention to the fact that there were no claims of negligence in the case (R. 128-132).

This motion was granted and the case was then placed on the docket of the Supreme Court of Texas, and on the 18th day of March, 1931, the Supreme Court of Texas rendered its opinion and judgment, holding, first, that at the time of the fire possession of

the shipment had passed from the Mallory Steamship Line to the Galveston Wharf Company; and, second, that the Galveston Wharf Company held the shipment with a liability of connecting carrier—that is, an insurer, and was liable for the loss and damage to the shipment, even though it was not guilty of negligence.

The opinion of the Supreme Court is not yet officially reported but is found on page 145 of the Transcript of Record.

Thereupon the Galveston Wharf Company, American Grocery Company and the other plaintiffs in the trial court, filed motions for rehearing. These motions were overruled by the Supreme Court of Texas on the 24th day of June, 1931 (R. 162).

C.

Reasons Relied Upon for Allowance of the Writ.

I.

The Supreme Court of Texas recognized in its opinion that the question as to whether the possession of the shipment at the time of the fire had passed from the Mallory Steamship Company to the Galveston Wharf Company, and the question as to whether the Galveston Wharf Company, if it had possession of the shipment, was liable as an insurer, were federal questions to be controlled by the decisions of the United States Supreme Court.

In the case of *Southern Ry. Co. vs. Prescott,* 240 U. S. 632, it was held that the question of burden of proof in a suit involving an interstate shipment was a federal question to be controlled by federal decisions.

In the case of *Georgia, Florida & Alabama Ry. Co. vs. Bliss Milling Co.*, 241 U. S. 190, this honorable court held that on a shipment under an interstate bill of lading a question of misdelivery by a terminal carrier was a federal question to be determined by federal decisions.

In the case of *Mo., Pac. Ry. Co. vs. Reynolds-Davis Co.*, decided by this honorable court, 268 U. S. 366, this court granted a writ of certiorari to the Supreme Court of the State of Arkansas on the ground that the question as to whether the switching carrier was a connecting carrier and performed a service as such raised a federal question.

II.

The decision of the Supreme Court of Texas is in conflict with the decision of the United States Supreme Court in the case of *Missouri Pacific Ry. Co. vs. Reynolds-Davis Co.*, 268 U. S. 366, in that the Supreme Court of Texas held in its decision that the Galveston Wharf Company, which was not a party to the bill of lading nor the tariffs of the carriers named in the bill of lading, and who was employed by one of the carriers named in the bill of lading to perform a switching service for it, was liable as a connecting carrier; while the Supreme Court of the United States in the Reynolds-Davis Company case held that a carrier employed by another carrier named in the bill of lading was not a connecting carrier, but merely an agent of the carrier named in the bill of lading.

III.

The decision of the Supreme Court of Texas to the effect that the Galveston Wharf Company was liable as a connecting carrier and insurer is in conflict with the decisions of the Supreme Court of the United States in the case of *Boston & Maine Ry. Co. vs. Hooker*, 233 U. S. 97; *Cau vs. Texas & Pacific Ry. Co.*, 194 U. S. 427; *Arthur vs. Texas & Pacific Ry. Co.*, 204 U. S. 506; *M., K. & T. Ry. Co. vs. Harriman*, 227 U. S. 657, which cases hold that tariffs of a carrier filed with the Interstate Commerce Commission become a part of the contract with it and that a contract for service is sufficient consideration for a limitation of a carrier's liability, the Supreme Court of Texas in its opinion holding that notwithstanding the limitation of liability, except for negligence, in the tariffs filed by the Galveston Wharf Company, that the Galveston Wharf Company was liable as an insurer.

IV.

The holding of the Supreme Court of Texas to the effect that at the time of the fire the possession of the shipment in question had passed from the Mallory Steamship Company to the Galveston Wharf Company is in conflict with the holdings of this honorable Supreme Court in the case of *Pratt vs. Grand Trunk Railway Co.*, 95 U. S. 43, and the case of *Clayton vs. Texas & Pacific Railway Company*, 173 U. S. 346, in that the Supreme Court of Texas held that notwithstanding the fact that the undisputed evidence showed

that under the customary course of dealing this shipment was to have been checked by the clerks of the Mallory Steamship Company and the Galveston Wharf Company before possession passed to the Wharf Company and that such checking had not taken place, possession had passed from the Mallory Steamship Company to the Wharf Company; whereas, the Supreme Court of the United States in such cases held in substance that the possession of such a shipment would not pass under such circumstances until such check was made.

V.

The holding of the Supreme Court of Texas to the effect that the Galveston Wharf Company, notwithstanding the provisions of its tariffs limiting its liability to its negligence was liable as a carrier or insurer, is in conflict with the principal decisions of this honorable Court to the effect that such a limitation of liability in the tariff is valid.

D.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this honorable Court to the Supreme Court of Texas, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings of the cause numbered and entitled on the Docket No. 27467, Galveston Wharf Company *vs.* American Grocery Com-

pany *et al.*, and that said decree and judgment of the Supreme Court of Texas may be reversed by this honorable Court, and that your petitioners may have such other and further relief in the premises as to this honorable Court may seem meet and just.

Respectfully submitted,

GALVESTON WHARF COMPANY,
By ALEX F. WEISBERG,
Counsel for Petitioners.

THOMPSON, KNIGHT, BAKER & HARRIS,
GEO. S. WRIGHT,
Of Counsel.

E.

The American Grocery Company adopts the foregoing petition and the Galveston Wharf Company joins in the prayer for writ of certiorari to the Supreme Court of Texas.

AMERICAN GROCERY CO.,
By FRYER & CUNNINGHAM,
Counsel for American Grocery Company.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 411

THE GALVESTON WHARF COMPANY ET AL.,

vs.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the Supreme Court of Texas has not been officially reported at the time of the filing of this brief, but the decision of the Supreme Court of Texas rendered on March 18, 1931, by that court may be readily found in the official reports when they are issued, and is found on pages 145 to 160 of the Transcript of the Record.

II.

Jurisdiction.

1. By the Acts of the Federal Congress known as the Interstate Commerce Act, the Federal Government has taken charge of the field of interstate commerce, and under this Interstate Commerce Act all questions of liability of carriers under interstate bills of lading are governed and controlled by the Federal decisions.

2. In the Supreme Court of the State of Texas the Galveston Wharf Company, American Grocery Company et al., plaintiffs in the trial court, filed motions for rehearings in due season on the 2d day of April, 1931 (R. 161). Each of these motions was overruled by the Supreme Court of Texas on June 24, 1931 (R. 162).

3. The Supreme Court of Texas in its opinion recognized that the Galveston Wharf Company and the American Grocery Company had raised a federal question to be controlled by the decisions of the Federal Courts (R. 152).

In the motions for rehearing filed by Galveston Wharf Company and American Grocery Company federal questions involved were raised (R. 161).

That the questions involved in this case were federal questions to be determined by the Federal decisions was also raised by the Galveston Wharf Company and American Grocery Company et al. in the assignments of error filed in the motions for rehearings filed March

27, 1930, and complaining of the first decision of the Supreme Court of Texas, which was later set aside (R. 128-132).

The Supreme Court of Texas held that under the Federal decisions (1) the possession of the shipment in question at the time of the fire had passed from the Mallory Steamship Company to the Galveston Wharf Company; (2) that notwithstanding the fact that the Galveston Wharf Company had merely contracted with one of the carriers in a bill of lading to load the shipment and switch the cars that said Galveston Wharf Company was liable for the shipment as a carrier or insurer; and (3) that notwithstanding the provisions of the tariffs of the Galveston Wharf Company filed with the Interstate Commerce Commission and delivered to the respective carriers named in the bill of lading to the effect that the Wharf Company should not be liable except for its negligence, the Galveston Wharf Company was liable as a carrier or insurer.

4. In the case of *Southern Railway Company vs. Prescott,* 240 U. S. 632, it is held that the question of burden of proof in a suit against the Railway Company on an interstate shipment was a Federal question to be controlled by the Federal Decisions.

In the case of *Georgia, Florida & Alabama Railway Company vs. Blish Milling Company,* 241 U. S. 190, the court held that under an interstate bill of lading the question of a misdelivery of the terminal carrier was a Federal question to be determined by the Federal Decisions.

In the case of *Missouri Pacific Railway vs. Reynolds-Davis Company,* 268 U. S. 366, this Honorable Court

granted a writ of certiorari to the Supreme Court of the State of Arkansas on the ground that the question as to whether the switching carrier was a connecting carrier and performed a service as such raised a Federal question.

III.

Statement of the Case.

A full statement of the case has been given under heading A in the petition and in the interest of brevity the statement is not repeated at this point.

IV.

Specifications of Error.

1. The Supreme Court of Texas erred in finding and holding that the possession of the shipment at the time of the fire had passed from the Mallory Steamship Company to the Galveston Wharf Company.

2. The Supreme Court of Texas erred in finding and holding that Galveston Wharf Company held the possession of the shipment at the time of the fire as a connecting carrier and not as an agent of the carrier named in the bill of lading.

3. The Supreme Court of Texas erred in finding and holding that at the time of the fire the Galveston Wharf Company was liable as insurer of the shipment in question when the provisions of the tariff of the Galveston Wharf Company, filed with the Interstate Commerce Commission and delivered to the carriers

named in the bill of lading, provided that the Galveston Wharf Company should not be liable except for its negligence.

V.

ARGUMENT.

Point One.

The Supreme Court of Texas, in its final opinion rendered in this case, cites as disputed evidence facts which in our judgment conclusively show that at the time of the damage to the shipment by fire on January 13, 1926, said shipment was in the possession of the Mallory Steamship Company and not in the possession of the Galveston Wharf Company. At page 152 of the Transcript of the Record the Supreme Court of Texas, in its opinion, says:

> "Let us briefly review the facts upon this issue:
>
> "Mr. Gossreau, General Manager for the Wharf Company, testified:
>
> "'At the time the fire occurred on January 13th, the Galveston Wharf Company absolutely had done nothing to take possession of the shipment of sardines. They had not handled it in any way. At the time of the fire they had not begun to start the service they were going to be paid for by the G., H. & S. A.' (R. 152, 153).
>
> "The tariffs introduced show wharf tariffs chargeable to the Steamship Company and loading and switching charges chargeable to the

railroad carrier. Mr. Gossreau further testified:

"'Outside of the $5,000 a year the Mallory Steamship Company pays us for the rental of Pier No. 24 and others. We receive compensation for one service from the Bay Lines, and we receive compensation for another service from the Mallory.'

"He further testified:

"'As to the understanding at the time of this fire as to when the Galveston Wharf Company took possession, the general understanding was that the shipments are taken possession of when they are lifted from the floor of the pier and deposited in the cars by the Galveston Wharf Company's forces for account of the Galveston Bay Lines.

"'The local freight is held on the pier and delivery is made to the consignees by the Mallory Line's forces from these same piers. That is the only place where they transact their business of receiving freight and discharging freight, on these piers that they rent from us.

"'At the time this fire occurred on January 13, 1926, the Mallory Line was exclusively using Pier No. 24 (R. 153).

"'It contains also wharfage charges covering freight passing over piers, which charge is assessed against the vessel or its owners.'

"Albert J. Schulte, Chief Dock Clerk and witness for the Steamship Company, testified that—

"'It is a fact that the Wharf Company's clerks enter a record of these shipments in that

billing on the books, just like the Mallory Line. * * * after they do that on carload lots, whenever the Galveston Wharf Company gets ready to pick up a carload lot at Pier No. 24, and put it on a car, they take a copy of the billing, accompanied by a clerk of the Mallory, and check those carload lots as they pick them up and take them over to the car.'

"The Steamship Company claimed the right, under proper orders, to divert the shipment at any time prior to the actual loading by the Wharf Company into the cars of the Railway Company (R. 154).

"Mr. Bertram, a witness for the Steamship Company, stated that—

" 'If we had been confronted with a diversion or reconsignment of that shipment of sardines to some dealer in Greenville, Texas, if the American Grocery Company had filed a diversion or reconsignment, we would have endeavored to have a diversion. We would have reconsigned it for the accommodation of the consignee. After the goods had actually been loaded in the cars and we had received the diversion or reconsignment order, the shipment would have been beyond our control.'

"The contract between the Wharf Company and the Steamship Company leasing to the latter the pier in question, provided that such pier would be leased by it and the evidence shows that on the night in question, at the time of the fire, this shipment of goods was being policed by the Steamship Company. It is undisputed that no part of the shipment had been loaded on the cars of the Railway Company (R. 154).

"Another cogent reason why the shipment of goods had not been delivered to the Railway Company is reflected in the fact, as shown by the uncontroverted evidence, that after the fire whatever remained of the cargo was salvaged by the Steamship Company" (R. 154).

On page 156 of the Transcript of the Record the Supreme Court of the State of Texas says:

"It is undisputed that the Steamship Company and leased certain piers from the Wharf Company for the purpose of unloading its freight; that the Wharf Company handled its cargoes and loaded it on the cars of the various railroad lines and then switched them from the Wharf Company to the railroad line receiving same. The testimony shows that if the Steamship Company should desire to divert the shipment before delivery to the railroad that it is authorized to do so. The trial court held that the delivery had not been made to the railroad and the testimony shows that it had not issued a receipt therefor. It is also shown that no part of this shipment had been loaded on the cars of the railroad. The General Manager for the Wharf Company testified that at the time of the fire it had done nothing to take possession of the shipment of sardines. At the time of the fire they had not begun to start the services they were going to be paid for by the railroad, and he further testified that the general understanding was that the shipments are taken possession of when they are lifted from the floor of the pier and deposited in the cars by the Wharf Company's forces for account of the Galveston Bay Lines."

We realize if there was a dispute in the evidence as to whether there had been a delivery of this shipment from the Mallory Steamship Company to the Galveston Wharf Company the finding of the State court would be conclusive upon such question of fact, but we respectfully submit that the undisputed evidence shows as a matter of law that this shipment at the time of the fire had not passed from the Mallory Steamship Company to the Galveston Wharf Company. This undisputed evidence shows that when a steamship came into Galveston over the Mallory Steamship Company the forces of the Mallory Steamship Company would unload the cargo from this ship into Pier 24, its unloading depot. If any parts of said cargo were damaged and needed to be recoopered or repaired the employees of the Mallory Steamship Company would repair or recooper such shipments (R. 52).

The Galveston Wharf Company had filed with the Interstate Commerce Commission the tariff which provided for a certain charge known as a loading charge, for which the Galveston Wharf Company agreed in the ordinary course of its business to pick up these shipments from Pier 24 and truck them to the railroad cars of the respective carrier named in the bill of lading standing on tracks of the Galveston Wharf Company opposite Pier 24 (R. 60-62). For this service the G. H. & S. A. Railway Company would pay the Galveston Wharf Company.

The same tariffs provided for a switching charge, which covered the service of the Galveston Wharf Company in switching the cars after the shipments had been put into them from the tracks adjacent to Pier

24 to the connecting line of the G., H. & S. A. This switching service, had it been performed, would have been paid for by the G., H. & S. A. Railway Company.

Before the Galveston Wharf Company would pick up the shipment from Pier 24 and truck it to the cars adjacent to Pier 24 a clerk of the Galveston Wharf Company and a clerk of the Mallory Steamship Company would check the shipment on the floor and thereafter, in due course, the Galveston Wharf Company would deliver to the Mallory Steamship Company a receipt for the goods picked up, which would always bear the date as of the time that the shipment was picked up from Pier 24. While this receipt might not be delivered to the Mallory Steamship Company until several days after the shipment was picked up the date it bore was always the date that the shipment was picked up from Pier 24 (R. 58-62).

The undisputed evidence shows that at the time the fire occurred there had been no check of the shipment involved in this case by the clerks of the Mallory Line and the clerks of Galveston Wharf Company (R. 76).

Under the custom of dealing between the parties the time had not been reached when it was the duty of the Galveston Wharf Company to pick up the shipment or to issue receipt for the goods to the Steamship Company (R. 76).

The shipment involved in this case was damaged and had to be repaired or recoopered by the steamship company. After it had been repaired and recoopered the Wharf Company was not notified that the shipment was ready to go, that the recoopering had been done and would not have known of this fact until the

following day when, in the ordinary course of business, it would have picked the shipment up from Pier 24.

The Steamship Company, by its failure to give the Wharf Company notice that the damaged portion of the shipment had been repaired, impliedly agreed that such notice might be acquired by the Wharf Company in the due course of its business.

The Steamship Company claimed the right upon proper order to divert the shipment at any time prior to the actual loading by the Wharf Company into the cars of the Railway Company, thus retaining dominion and control over the shipment which was damaged prior to the time when the Wharf Company was to pick it up.

The shipment involved was cared for and policed by the agents of the Steamship Company up to the time that it was destroyed by fire, which showed an exercise of dominion and control over this shipment by the Steamship Company at the time the fire occurred.

The Steamship Company and the Wharf Company interpreted the mutual understanding existing between them as placing possession of the goods with the Steamship Company at the time of the fire when the latter company, without protest from the former, assumed to and did handle on its own account the salvage of the goods which were damaged by the fire.

In the *Clayton Case,* decided by this Honorable Court, 173 U. S. 346, shipment was delivered in Texas to a railway company to be carried to Liverpool, England. The bill of lading provided that the carrier alone in whose actual custody the goods should be at the

time of their loss should be liable therefor. The loss occurred before the goods had been actually delivered to the said carrier, although they were placed by the Company on the wharf where the steamship company, the next connecting carrier, usually received goods and notice was given by the railway company to the steamship company. The railway company had requested the steamship company to remove the goods but the steamship company had not done so. The time of taking the goods from the wharf was entirely within the control of the steamship company. While the goods were located in the designated place on the wharf they were destroyed by fire. Notwithstanding these facts this Honorable Court held that at the time the fire occurred the shipment involved in the Clayton Case was not in the actual custody of the steamship company.

In the case at bar the Galveston Wharf Company had received no notice from the Mallory Steamship Company that the shipment was ready to be picked up. If the fire had not occurred on the night of January 13, 1926, in the ordinary course of business of the following day the clerk of the Galveston Wharf Company and the clerk of the Mallory Steamship Company would have checked the shipment involved and upon the information of this check the Galveston Wharf Company would have in the ordinary course of business delivered a receipt to the Mallory Steamship Company as of the time of the picking up of the shipment, viz., the 14th day of January, 1926. If at the time of the fire, under the undisputed evidence the Mallory Steamship Company had received the order to divert this

shipment it would have been diverted by it without consulting the Galveston Wharf Company. After the Galvestor Wharf Company had finished work for the day of January 13, 1926, during that night this shipment was destroyed by fire while in Pier 24, leased by the Mallory Steamship Company, and it was watched and policed by the employees of the Mallory Steamship Company. The day after the fire occurred the Mallory Steamship Company, recognizing the fact that it had possession of this shipment at the time of the fire, took charge of the salvage and sold it without consulting the Galveston Wharf Company. We respectfully submit that at the time the fire occurred possession of the shipment involved in this case had not passed from the Mallory Steamship Company to the Galveston Wharf Company, as shown by the undisputed evidence.

Point Two.

The holding of the Supreme Court of Texas to the effect that at the time of this fire the Galveston Wharf Company held the shipment as a connecting carrier is, we respectfully submit, in direct conflict with the holding of this Honorable Court in the case of *Missouri Pacific Railway Company vs. Reynolds-Davis Grocery Co.*, 268 U. S. 366, decided May 25, 1925, by Justice Brandeis. In that case suit was brought in the State court of Arkansas against the Missouri Pacific Railroad to recover the loss of a carload of sugar shipped from a point in Louisiana to Ft. Smith, Arkansas, on a through bill of lading. The loss occurred in the City of Ft. Smith while the car was in the possession of the St. Louis & San Francisco Railroad, which had

been employed by the Missouri Pacific to switch the car from a point on its line within the city to the consignee's warehouse, which lay within the city on the lines of the switching carrier. The Missouri Pacific requested the trial court to rule that as the bill of lading provided that no connecting carrier should be liable for any damage which did not occur on its own line and delivery at the consignee's warehouse was part of an interstate shipment, the defendant was not liable because it was neither the initial or delivering carrier. The court refused to rule as requested. The jury found for the plaintiff and the judgment entered on the verdict was confirmed by the Supreme Court of Arkansas. This Honorable Court, speaking through Justice Brandeis, said:

> "This Court granted a writ of certiorari (68 L. Ed. 1188). The joint through rate covered delivery at the warehouse of the consignee. The Bill of Lading named Morgan's Louisiana & Texas Railroad & Steamship Company as initial carrier and the route designated therein named the Missouri Pacific as the last of the connecting carriers. Its lines enter Fort Smith but do not extend to the consignee's warehouse. *It employed the St. Louis & San Francisco to perform the necessary switching service and then paid therefor* $6.30, *the charge fixed by the tariff on file with the Interstate Commerce Commission. The switching carrier was not named in the Bill of Lading and did not receive any part of the joint through rate. It was simply the agent of the Missouri Pacific for the purpose of delivery. The Missouri Pacific was the delivering carrier and is liable as such.*"

Point Three.

If at the time of the fire the shipment involved in this case was in possession of the Galveston Wharf Company, the provisions of its tariff filed with the Interstate Commerce Commission were a part of the contract between the Galveston Wharf Company and the carriers named in the bill of lading. The provision of such tariff to the effect that the Wharf Company should not be liable for damage to the shipment except for its negligence is valid and as all claims of negligence were abandoned the Wharf Company was not liable for the loss to the shipment involved. Neither the Mallory Steamship Company, named in the bill of lading as an intermediate carrier, nor the G., H. & S. A. Railway Company, named in the bill of lading as the delivering carrier, was required to use the services of the Galveston Wharf Company in transferring shipments from the Mallory Steamship Company's docks to the cars of the G., H. & S. A. Railway Company. They could have made arrangements for motor trucks or some other means of transportation to transfer such shipments. The shipper named in the bill of lading made a contract with the Mallory Steamship Company and the G., H. & S. A. Railway Company under the terms of which those carriers agreed to transport his property from New York to El Paso, Texas. The shipper did not make any contract with the Galveston Wharf Company. The Galveston Wharf Company filed with the Interstate Commerce Commission tariffs covering certain services it was willing to render to the Mallory Steamship Company and the

G., H. & S. A. Railway Company at Galveston. This tariff contained the following provision:

> "Under rates named in Items 42, 48 and 50, the railroad company from which is received or to which freight is delivered shall be liable for loss and damage occurring to freight on lines of this company other than through the negligence of this company."

These tariffs were furnished to the Mallory Steamship Company and the G., H. & S. A. Railway Company prior to the shipment involved in this case. When the carrier named in the bill of lading involved in this case employed the Galveston Wharf Company to render the loading and switching service on this shipment such employment was under this tariff, and such tariff provision became a part of the contract for such service.

In the case of *Boston & Maine R. R. vs. Hooker*, 233 U. S. 97, this Honorable Court held that a regulation contained in the published tariff of an interstate railway carrier on file with the Interstate Commerce Commission limiting its baggage liability to one hundred dollars unless a greater value is declared and stipulated by the owner and an excess charge is paid, is binding upon the passenger in case of loss of the baggage through the carrier's negligence, regardless of the passenger's lack of knowledge of or assent to such regulation and regardless of the carrier's failure to inquire as to the value of the baggage; and in the case of *M., K. & T. vs. Harriman*, 227 U. S. 669, this Honorable Court said that the shipper was compelled

to take notice of the rate sheets contained in tariff schedules not only because referred to in the contract signed by them but because they had been lawfully filed and published; and in the case of *C., R. I. & P. Ry Co. vs. Cramer*, 233 U. S. 490, this Honorable Court said:

> "That the rule of liability (universal rule established by the Hepburn Act) is to be enforced in the light of the fact that the provisions of the tariff enter into and form a part of the contract of shipment."

Under these decisions, we respectfully submit that the tariffs filed by the Galveston Wharf Company with the Interstate Commerce Commission limiting its liability to loss and damage by negligence became a part of the contract between the parties to this litigation, just as if said limitation of liability had been written into the contract between the parties. If such a limitation had been written into the contract between the parties such a limitation would have been valid.

In the cases of *Cau vs. Texas Pacific Ry Co.*, 194 U. S. 427, and *Arthur vs. T. & P. Ry Co.*, 204 U. S. 506, this Honorable Court held that the contract for service was a sufficient consideration for the limitation of the carrier's liability except for negligence. The cases of Cau and Arthur against the railways cited above were cases involving shipments under bills of lading containing a limitation of the carrier's liability except for negligence, and this Honorable Court held in those cases that the contract of carriage was sufficient consideration for the limitation of liability even though there was no choice of rates offered the shipper. The contract for the services of the Galveston Wharf Com-

pany was sufficient consideration for the limitation of the Wharf Company's liability as contained in the tariff. The principle is the same whether the limitation of the carrier's liability is contained in a tariff which is a part of a switching contract as where the limitation is contained in a contract in the form of a bill of lading.

The fact that the bill of lading, to which the Wharf Company was not a party, does not contain any provision limiting the liability of the carrier therein named to a liability for negligence does not affect the validity of the provision of the contract between the carriers named in the bill of lading and the Wharf Company containing such limitation as evidenced by the tariffs of the Galveston Wharf Company on file with the Interstate Commerce Commission.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the decision of the Supreme Court of Texas should be reviewed and revised by this Court and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Texas and finally reverse it.

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Of Counsel.

The American Grocery Company adopts the foregoing brief of the Galveston Wharf Company in support of the petition for certiorari.

AMERICAN GROCERY CO.,
By FREYER & CUNNINGHAM,
Attorneys for American Grocery Company.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1931

No. 411

GALVESTON WHARF COMPANY, et al,
Petitioners,

vs.

GALVESTON, HARRISBURG, & SAN ANTONIO RAILWAY COMPANY, et al,
Respondents.

SUPPLEMENTAL BRIEF OF GALVESTON WHARF COMPANY ON WRIT OF CERTIORARI

THOMPSON, KNIGHT, BAKER & HARRIS,
GEORGE S. WRIGHT,
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MAY IT PLEASE THE COURT:

In view of the fact that all the points relied upon by the Galveston Wharf Company in this case are covered by the brief in support of the petition for writ of certiorari, we do not deem

it necessary to file an additional brief, but we do desire to call the court's attention to one or two errors made in the printing of the brief and to amplify the questions presented in the brief, in view of the brief filed by the Galveston, Harrisburg & San Antonio Railway Company.

POINT ONE

On page five of our brief, in the argument on Point One, the printer used the expression "disputed evidence", when the language should have been "undisputed evidence". In other words the evidence cited by the Supreme Court of Texas set out in the brief on pages 5 and following is undisputed evidence.

To our minds it is astonishing that the Supreme Court of Texas should hold that at the time of the fire in this case possession of the shipment in question had passed from the Mallory Steamship Company to the Galveston Wharf Company, when that court has found as undisputed evidence the following facts:

1. That as to the understanding at the time of the fire as to when the Galveston Wharf Company took possession, the general understanding was that shipments were taken possession of when they were lifted from the floor of the pier and

deposited in the cars by the Galveston Wharf Company's forces for account of the Galveston Bay Lines (the Galveston, Harrisburg & San Antonio Railway Company). (Record, p. 153.)

2. That whenever the Galveston Wharf Company got ready to pick up a carload lot at Pier 24 and put it on a car, it took a copy of the billing and, with a clerk of the Mallory Steamship Company, checked the carload lots and picked them up and took them over to the cars. (Record, p. 55.)

3. That at the time the fire occurred on January 13, 1926, the Galveston Wharf Company had done absolutely nothing to take possession of the shipment of sardines. They had not handled it in any way. At the time of the fire they had not begun the service for which they were going to be paid by the Galveston, Harrisburg & San Antonio Railway Company. (Record, pp. 152-53.)

4. That the steamship company claimed the right under proper orders to divert the shipment at any time prior to the actual loading by the Galveston Wharf Company into the cars of the railway company. (Record, p. 154.)

5. That on the night in question at the time of the fire the Mallory Steamship Co. was exer-

cising dominion and control over the shipment as it was being policed by the Mallory Steamship Company, thus exercising dominion and control over the shipment. (Record, p. 154.)

6. That after the fire whatever remained of the cargo was salvaged by the Mallory Steamship Company. (Record, p. 154.)

In addition to these undisputed facts cited by the Supreme Court of Texas as the evidence in the record, the following facts are undisputed:

1. That at the time the fire occurred on the night of January 13, 1926, the time had not arrived when, in the ordinary course of business, the Galveston Wharf Company would have begun its first service, consisting of picking up the shipment from the Mallory Steamship Company's unloading depot and transferring it to the cars of the Galveston, Harrisburg & San Antonio Railway Company. (Record, p. 76.)

2. That at the time the fire occurred there had been no check of the shipment involved in this case by the clerks of the Mallory Steamship Company and the Galveston Wharf Company, and no receipts had been given by the Galveston Wharf Company to the Mallory Steamship Company. (Record, pp. 62 and 76.)

3. Under the universal custom existing with reference to the handling of freight, while the receipts based on the joint checking of the Mallory Steamship Company and the Galveston Wharf Company might be delivered to the Steamship Company for several days after the shipment had been picked up, they always bore the date on which the shipment was actually picked up from the pier. (Record, pp. 49, 58, 62 and 64.)

4. The shipment involved in this case had been damaged and had to be repaired or recoopered by the Mallory Steamship Company. It was repaired or recoopered by the Steamship Company about four o'clock in the afternoon of the day on which the fire occurred, but there is no evidence indicating that the Galveston Wharf Company was notified that the recoopering had been done and that the shipment was ready to go, and in the ordinary course of business the Galveston Wharf Company would not have known of this fact until the following day, when it would have picked up the shipment from Pier 24.

5. Under the undisputed evidence the Mallory Steamship Company, by its failure to give the Galveston Wharf Company notice that the damaged portion of the shipment had been repaired, impliedly agreed that such notice might be ac-

quired by the Galveston Wharf Company in the due course of business.

6. The written lease contract between the Galveston Wharf Company and the Mallory Steamship Company provided that the Wharf Company "shall in no way be responsible for any loss and damage to any goods or cargoes handled over and through said wharves, sheds and warehouses unless same be caused by defects in the roofs of warehouses." (Record, p. 83.)

7. After the damaged part of the shipment had been repaired by the Mallory Steamship Company the Galveston Wharf Company was not afforded a fair opportunity in the due and ordinary course of its business to possess the goods.

If there had been no fire and on the night of the 13th of January, 1926, some thief or pilferer had entered the premises of the Mallory S. S. Company, where these goods were located, and had appropriated some of the merchandise in this shipment, on the following day, in the ordinary course of business, when the Galveston Wharf Company checked with the S. S. Company the items composing this shipment, it would have developed that the parts of the shipment stolen or pilfered were not on hand, and the Galveston Wharf Company would have given a receipt in due course

for them as of the date of the checking, for the amount of the shipment, less the items that had been stolen. If no fire had occurred, we do not believe that any one connected with this case would have contended that under such circumstances, the Mallory S. S. Company would not have been responsible for the parts of the shipment stolen during that night. While it was exercising dominion over the shipment. A fire occurred on the night in question, the origin of which is unknown, and destroyed the shipment involved. The responsibility of the Mallory S. S. Company is the same in the case of the fire as it would have been in the case of the pilferer.

The only evidence we have been able to find in the entire record in this case upon which the Mallory Steamship Company might attempt to rely as in conflict with the above undisputed facts is the statement of one of the witnesses for the Mallory Steamship Company that he considered they delivered freight to the Wharf Company when it was in readiness to be lifted from the pier and loaded into railway cars, that there was nothing else to be done by the Mallory Steamship Company. The witness who was the author of this conclusion was the same witness who testified to one of the undisputed facts above outlined to the effect that the clerks of the Mallory Steam-

ship Company and the Galveston Wharf Company would check the shipments as they were lifted from the pier. This conclusion of such witness can be given no probative force, because it is a mere legal conclusion which is affirmatively shown not to be supported by the undisputed evidence in this case.

Railway Company vs. Phillips, 63 Tex. 590;

San Antonio Water Supply Co. vs. Castle, 199 S. W. 300;

C. R. I. & G. Ry. Co. vs. Johnson, 224 S. W. 217.

We respectfully refer this honorable court to the decisions of the Federal Court to the effect that before delivery of a shipment can be made, the party to whom it is to be delivered must have a reasonable time to possess the shipment.

Richardson vs. Goddard, 16 U. S. (L. Ed.) 412, 23 How. 28;

Mary Washington, 1 Abb. 1, Chase 125, 16 Fed. Case No. 9229;

Carana vs. British, etc., 6 Ben. 517, 5 Fed. Cas. No. 2484;

Turner vs. Huff, 55 Am. Rep. 580.

We respectfully submit to this honorable court that under the undisputed evidence shown by the

record and under the undisputed evidence found by the Supreme Court of Texas, at the time the fire which damaged the shipment involved in this litigation occurred the possession of the shipment was with the Mallory Steamship Company and it was exercising dominion and control over the same as a carrier. The Supreme Court of Texas, by its decision and holding that the possession of this shipment was with the Galveston Wharf Company, has attempted to place upon the Galveston Wharf Company the severe liability of an insurer of this shipment, simply because the Galveston Wharf Company had made an agreement which in substance meant that on January 14, 1926, (the day after the fire) it would check the shipment with the Mallory Line and pick up the shipment from the unloading depot of the Mallory Steamship Company, provided it was ready to move, and place it in the cars of the Galveston, Harrisburg & San Antonio Railway Company.

POINT TWO

In our original brief filed in support of petition for writ of certiorari, we called this honorable court's attention to the case of Missouri Pacific Railway Company vs. Reynolds-Davis Grocery Company, 268 U. S. 366, decided May 25, 1925,

by Justice Brandeis. We did not refer the court to any other decision on this question because we felt that such decision of this honorable court was in conflict with the holding of the Supreme Court of Texas in this case to the effect that at the time of the fire the Galveston Wharf Company held the shipment involved in this litigation as a connecting carrier without liability of an insurer. We respectfully submit that the criticisms of this case by counsel for the Mallory Steamship Company and the Galveston, Harrisburg & San Antonio Railway Company as authority for our position here are without merit. The substance of the criticisms of this authority of this honorable court in support of our position is that in the Reynolds-Davis Grocery Company case suit was not brought against the St. Louis, San Francisco Railway Company, the switching carrier. The bill of lading in the Reynolds-Davis Grocery Company case contained a valid provision exempting the Missouri Pacific Railway Company from any and all liability upon delivery of the shipment to the next connecting carrier. This honorable court held that the Missouri Pacific Railway Company could not rely upon this provision because the St. Louis & San Francisco Railway Company, the switching carrier, to whom the Missouri Pacific Railway Company delivered the shipment,

was not a connecting carrier, but merely a switching agent of the Missouri Pacific Railway Company. We are at a loss to understand why counsel for the various parties have sought to find statutes and decisions to the effect that corporations engaged in a similar business to that of the Galveston Wharf Company are common carriers, that they are carriers under the Safety Appliance Act and other Acts. The position of the Galveston Wharf Company in this case is that because of the facts existing in this case, even if the possession of the shipment was with it, its liability is not that of a connecting carrier, the liability of an insurer. In the Reynolds-Davis Grocery Company case no one could contend that the St. Louis & San Francisco Railway Company was not a common carrier, yet this court said it was not a connecting carrier. If, when this shipment arrived at Galveston, the Mallory Steamship Company or the Galveston, Harrisburg & San Antonio Railway Company had employed a negro laborer to load the shipments from the depot of the Mallory Steamship Company into the cars of the Galveston, Harrisburg & San Antonio Railway Company, could it be successfully contended that this negro laborers was liable as connecting carriers on this shipment? The first service which the Galveston Wharf Company was employed to perform was merely the loading service, and yet, not-

withstanding the undisputed evidence that the time had not arrived for the beginning of this loading service and the Galveston Wharf Company had not begun to perform such service, the Supreme Court of Texas has said that the Wharf Company was responsible for this shipment as an insurer because it held it as a connecting carrier.

We respectfully call this honorable court's attention to the following decisions on this question:

Texas & Pacific Railway Company vs. Scoggins & Brown (Tex. Civ. App), 90 S. W. 321. In this case plaintiffs sued Texas & Pacific Railway Company for damages to a shipment of cattle from Colorado, Texas, to East St. Louis over the lines of the Texas & Pacific Railway Company, and the Missouri-Kansas & Texas Railway Company of Texas. The initial carrier, Texas & Pacific Railway Company, shipped the cattle to the Belt Railway Company at Fort Worth for delivery to the Union Stockyards, where cattle intended for further transportation over the lines of the two Missouri, Kansas & Texas Railway Companies are always delivered. There was evidence indicating that the cattle were injured in Fort Worth. The plaintiffs claimed they were injured through negligence. The Texas & Pacific Railway Com-

pany sought to make the Belt Railway Company a party defendant. The trial court instructed the jury that the Belt Railway Company was not a connecting carrier and that a delivery of the cattle by the Texas & Pacific Railway Company to such Belt Railway would not be a delivery to the next connecting carrier, since the Belt Railway appeared to have been the agency selected by the Texas & Pacific to deliver the cattle at the Union Stockyards. The Court of Civil Appeals said:

> "Under the facts of this case we fail to see that there was error in instructing the jury that the Belt Railway Company of Fort Worth was not a connecting carrier and that a delivery of the cattle to such Belt Railway Company would not be a delivery to the next connecting carrier. We fail to see that the Texas & Pacific Railway Company had any right to join the Fort Worth Belt Railway Company as a party defendant in the action below. The Belt Railway Company appears from the undisputed evidence to have been the agent of the lines connected with this shipment for their mutual convenience at Fort Worth and, if it is liable to them, they have their action against it." (An action for negligence and not as a connecting carrier.)

In the case of St. Louis, Southwestern Railway Company of Texas vs. A. A. Jackson, 118 S. W. 853, the Court of Civil Appeals at Dallas, Texas, said:

> "The car of apples in controversy was consigned at Mednia, New York, to appellee at Dallas, Texas. The St. Louis, Southwestern Railway Company transported said car from Memphis, Tennessee, to Texarkana, Texas, and there delivered said car to the co-defendant, St. Louis, Southwestern Railway Company of Texas, the appellant, who transported the same to Dallas, Texas, and delivered said car to the Terminal Railway Company at Dallas, which Terminal Railway Company in turn delivered it to the Texas & Pacific Railway Company of Texas, to be shifted by the last railway company to the house track of the appellee on the line of the Texas & Pacific Railway Company. **The Texas & Pacific Railway Company, in placing the car on the unloading track, was not a connecting carrier within the meaning of the statute, but acted as the agent of the appellant.**"

The Texas & Pacific Railway Company, a switching carrier, was a party to the suit. In the trial court the suit against the Texas & Pacific Railway Company was dismissed and judgment rend-

ered against the St. Louis and Southwestern Railway Company of Texas, who delivered the shipment to the Terminal Company which in turn delivered it to Texas & Pacific Railway Company to be switched by the company to the house track of the consignee. The Texas & Pacific Railway Company was not named in the bill of lading, was not a party to the contract of carriage.

In the case of Chicago, Rock Island & Gulf Railway Company vs. Young & Ball, 107 S. W. 127, by the Texas Court of Civil Appeals at Texarkana, plaintiff sued the Chicago, Rock Island & Gulf Railway Company and the Belt Railway Company of Fort Worth, the switching carrier, for damages occasioned in shrinkage in weight of cattle occasioned by detention and delay and the alleged failure of the Chicago, Rock Island & Gulf Railway Company to operate its train according to schedule time and with reasonable dispatch, and for negligent unloading of the cattle into unsuitable pens in Fort Worth, Texas, the destination of the cattle. Judgment was rendered against the Chicago, Rock Island & Gulf Railway Company in favor of the plaintiff and in favor of the Belt Railway Company, the switching carrier, against the plaintiff. The Court of Civil Appeals affirmed the judgment in favor of the Belt Railway Company and reversed and

remanded the judgment of the plaintiff against the Chicago Ry. Co. because of an error in the measure of damages adopted by trial court.

In remanding the case for another trial the Court of Civil Appeals said:

> "While handling the shipment the Ft. Worth Belt Railway Company acted as an agent of the appellant, Chicago, Rock Island & Gulf Railway Company, yet it plainly appears that there is no evidence of any delay or of negligence or damage on the part of the Fort Worth Belt Railway Company while the shipment was in its possession; therefore, the case will be affirmed as to the Fort Worth Belt Railway Company and reversed and remanded as to Chicago, Rock Island & Gulf Railway Company."

In the case of Rio Grande Railway Company vs. Kraft & Medero, by the Court of Civil Appeals at El Paso, 212 S. W. 981, plaintiff sued the Southern Pacific, the Rio Grande and the Santa Fe Railway Companies to recover damages to a shipment of cattle. The shipment originated in Arizona and moved over the Southern Pacific to El Paso, Texas, where the cattle were unloaded and watered. Then they moved to Denver, Colorado, over the Santa Fe Railway Company.

The initial carrier billed the shipment to Denver, but when they were received at El Paso by the Rio Grande, such company issued new bills of lading for their shipment from El Paso to Denver. The trial court submitted the issue of negligent, rough handling and negligence in furnishing a defective car with a hole in the floor. Judgment was rendered in favor of the plaintiffs against the Southern Pacific and the Santa Fe Railway Companies. Upon arrival of the shipment at Denver the Santa Fe Railway Company turned same over to the Colorado & Southern Railway Company to be switched to the Denver Stockyards for unloading. There was evidence of some damage occurring while the cattle were in the possession of the Colorado & Southern Railway Company. The court said:

> "The Santa Fe Railway Company complains of refusal of an instruction that it was not liable for death or injury occurring while the cars were being switched by the Colorado & Southern. The record discloses that the Colorado & Southern does the switching to the stockyards for the Santa Fe at Denver. It thus was not acting as a connecting carrier, but as an agent of the Santa Fe in this switching movement. The charge was properly refused."

In the case of Lancaster vs. Hollebecke, by the El Paso Court of Civil Appeals, 235 S. W. 1115, plaintiff sued the receivers of the Texas & Pacific Railway Company for damage to a shipment of horses moving from Pecos, Texas, to Shreveport, Louisiana, over the Texas & Pacific Railway Company via Fort Worth and from Shreveport to Brandon, Missisippi, over the lines of connecting carriers. Plaintiff contended that the animals were unloaded, fed and watered at Fort Worth, that they were reloaded at Fort Worth and remained in the cars for forty-two hours before they were fed and watered at Shreveport, and that when the animals were reloaded at Fort Worth they were placed in old cars with rails protruding therein and were roughly handled in transportation from Fort Worth to Shreveport. The Court of Civil Appeals said:

> "It appears that upon arrival of the shipment at Fort Worth it was delivered by the Texas & Pacific Railway Company to what is referred to in the evidence as the 'Belt', which took them to the stockyards, where they were fed and watered and reloaded. It is contended by appellant that they are not liable for damage sustained by animals by reason of improper condition of the cars into which they were reloaded at Fort Worth, because

the animals were shipped with the Fort Worth Privilege, which means that appellee had the right to terminate the transportation at Fort Worth and sell the animals there, and since the delivery to the Belt Railway at Fort Worth was made because of this privilege, appellants were not liable for the action of the Belt in reloading into defectiye cars. But there is nothing in the evidence to show that the shipment was made with the Fort Worth privilege. The bill of lading provides for transportation of the shipment from Pecos to Shreveport, consigned to Hollebecke at Brandon, Mississippi. It was the duty of the appellants to deliver the shipment in Fort Worth at the stockyards, where they could be unloaded, fed and watered as the law requires, and when the journey was resumed, to furnish proper cars into which they might be reloaded. If it delegated this duty to the Belt, it is answerable for an improper discharge of the same."

In the case of Texas & Pacific Railway Company vs. Henson, by the Supreme Court of Texas, 132 S. W. 1118, by Chief Justice Gaines, suit was brought against the Texas & Pacific Railway Company. The Texas & Pacific Railway Company filed a cross action against the Fort Worth

Belt Railway Company. Judgment of the Court of Civil Appeals affirmed judgment for plaintiff and affirmed judgment sustaining a plea of privilege to be sued in another county by the Belt Railway Company. The Supreme Court affirmed judgment for the plaintiff against Texas & Pacific Railway Company and reversed and remanded judgment for the cross defendant, Belt Railway Company. The court said:

> "It may be doubtful whether the Fort Worth Belt Railway Company is a railroad company in the broad sense of those terms, or a common carrier, but that it is a transportation company, we have no doubt. Our conclusion is that the Fort Worth Belt Railway Company is a transportation company within the meaning of the statute quoted, and when it carries the cars of another company loaded with livestock from the intersection with such other company to the stockyards at Ft. Worth, **and it fails to exercise proper care in the carriage or handling of such livestock, it becomes liable to the plaintiff or to the company for which it acts in the transportation of the livestock, for all damages resulting from its negligence in so doing.**"

In the case of Hooper vs. Chicago & Northwestern Railway Company, 9 Amer. Reports, 443,

plaintiff delivered merchandise to defendant for transportation to a point beyond its lines and received a bill of lading providing that the goods should be forwarded to defendant's terminal station. The goods were so forwarded and were stored in defendant's warehouse, where they were destroyed. The railway company contended that under the bill of lading it was charged only with the duty of transporting the goods to Chicago and of depositing them in its warehouse, and that when it had done so its duties as a carrier ended and was thence liable only in the capacity of a warehouseman. The evidence showed that under the custom and course of dealing the railway company was charged with the duty of delivering the goods to the next connecting carrier for shipment to Boston. The railway company contended that under the custom freight arriving at Chicago over its lines and destined to points beyond was unloaded into its warehouse and was then placed in a particular portion of said warehouse set aside for such freight, and it was then delivered to one Huntoon, who owned teams and horses and who was engaged in the business of a common carrier in Chicago; that Huntoon was a common carrier between the terminus of the company's road, its depot in Chicago and the places where other lines of transportation commenced, and, in this case, the docks where the flour was

to be delivered to the succeeding carrier by water, and that the deposit of the flour in that part of the company's warehouse where Huntoon was accustomed to receive and take all goods to be transferred by him was a delivery to Huntoon as the next carrier in the course of transportation, and full performance of the contract on the part of the company. Chief Justice Dickson said:

> "If the evidence showed that Huntoon was a common carrier of goods in the way specified, then it might become necessary to consider the effect of depositing the goods in the warehouse, as testified by the witnesses, or whether that was a delivery to him, but the evidence does not show that he was such a carrier. On the contrary it shows that **he was a mere transfer agent of the company, or car man, employed by it to deliver the goods to the next carrier in the line of transportation.** It is true that the mode of doing the business was for Huntoon to advance the charges of the company and give receipts for the goods and then collect these charges, together with his own, to the next carrier, but this was for convenience merely and did not change his character as an agent. Huntoon was the transfer agent of the company and not a common carrier as contended."

This rather ancient case throws considerable light upon the question involved in the case at bar. Upon first impression one might think that this case was not in point, but such impression would be based largely upon the fact that Huntoon was an individual rather than a Wharf Company or Railway Company. Huntoon, however was performing the same character of service that was performed by the Belt Line in the many cases cited above and as was to be performed by the Wharf Company in the case at bar. Huntoon's regular business was transporting merchandise from the depot to the railway company to the line of the next connecting carrier. He made a charge for this service which was paid by the carrier. The fact that he was an individual rather than a Belt Line or Wharf Company makes no difference in the application of the principle of agency. As an agent he had a specific duty to perform. Unless he was guilty of negligence in its performance or in the failure to perform such duty, he would not be answerable to his principal for the loss and damage to the goods in his custody. In the case at bar, even if the possession of the shipment had passed to the Wharf Company, the Wharf Company was acting as agent of the carrier to perform a certain service and should not be held responsi-

ble for loss to the shipment unless such was due to its negligence.

We also refer this honorable court to the cases of Wilbur vs. Wabash Railway Company, by the St. Louis Court of Civil Appeals, 129 S. W. 484; Atlanta Natl. Bank vs. Southern Ry. Co., 106 Fed., p. 623 at p. 627.

POINT 3

In our original brief, under Point 3, we took the postion that, if for any reason it should be held at the time of the fire which damaged the shipment involved in this suit the shipment was in the possession of the Galveston Wharf Company, then the Galveston Wharf Company was not responsible except for negligence, because of the provisions in the tariffs of the wharf company filed with the Interstate Commerce Commission and supplied by the wharf company to the Mallory S. S. Company and G. H. & S. A. Railway Company prior to the damage to the shipment. This tariff provides:

> "Under Rates, Name and Items 40, 42, 48 and 50, the Railroad Company from which freight is received or to which freight is delivered, shall be liable for all loss or damage occurring to freight on lines of this Company,

other than through the negligence of this Company, and this Company shall not be liable for any injury to cars while in its possession, except through its own negligence." (Record, Exhibit 86-D, Item 6-C.)"

The G. H. & S. A. Railway Company, in its brief, contends that this provision of the tariff is not applicable, because the rates under Items 40, 42, 48 and 50 apply to the service of the wharf company in switching loaded cars. It will be noted that the exemption from liability is not limited to the items named in the tariff, but the tariff specifically provides that the railroad company to which freight is delivered shall be liable for all loss or damage occurring to freight on lines of this Company. If, at the time of the fire, the shipment was in possession of the Galveston Wharf Company, such shipment was on the lines of that Company, and we respectfully submit that the language "on lines of this Company" in Tariff is sufficiently broad to cover the shipment in question. In the contract between the Galveston Wharf Company and the Mallory S. S. Company covering the leasing of the piers for use by the Mallory S. S. Company, is a provision to the effect that the Wharf company shall in no way be responsible for any loss or damage to any goods or cargoes handled over and through said wharves,

sheds and warehouses, unless they be caused by defects in roofs of warehouses, etc. (Record, p. 83.) It will thus be seen that the Galveston Wharf Company took precautions in the handling of the great volume of merchandise passing over its piers, to obtain agreements from the Mallory S. S. Company and the rail lines, which provide in substance that the wharf company should not be liable for loss and damage to such merchandise, except for its negligence. The wharf company was not a party to the bill of lading, it had no contract, express or implied, with the shipper or the consignee named in the bill of lading, the carriers named in the bill of lading were not obligated to use the Galveston Wharf Company at Galveston in transferring various shipments from the depot of the Mallory S. S. Company to the lines of the rail carrier, the services of trucks or draymen could have been used to transfer such shipments, but the carriers named in the bill of lading selected the Galveston Wharf Company, and each of them in substance provided by agreement with the Galveston Wharf Company that that company should not be liable except for negligence. Such an agreement is not against public policy, nor in violation of any Federal Statute, and should not be disregarded merely because the plaintiff, who had a contract with the carriers, the Mallory S. S. Company, and the G. H. & S. A. Railway Company,

had contracted with those two companies that they should be liable for this shipment from point of origin to point of destination as carriers.

CONCLUSION

We respectfully submit that it would be manifestly unjust to hold the Galveston Wharf Company responsible as a carrier for the destruction of the shipment involved in this case at a time when the Mallory S. S. Company was asserting and exercising dominion and control over the shipment, and when the wharf company had not had an opportunity to check the goods with the representatives of the Mallory S. S. Company, and when at the time of the fire the time had not arrived for it to begin the performance of the first service that it was to render, and petitioner prays that the judgment of the Texas Supreme Court be reversed, and for such other relief to which it may be entitled.

Counsel for Galveston Wharf Co.

THOMPSON, KNIGHT, BAKER & HARRIS
GEO. S. WRIGHT,
of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1931

No. 411

GALVESTON WHARF COMPANY, et al,
Petitioners.

vs.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY, et al,
Respondents.

BRIEF OF AMERICAN GROCERY CO., et al

FRYER & CUNNINGHAM
of Counsel

RHODES S. BAKER,
Counsel

R. Dunman & Co., Printers

IN THE

Supreme Court of the United States

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GALVESTON WHARF COMPANY, et al,
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vs.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY, et al,
Respondents.

BRIEF OF AMERICAN GROCERY CO., et al

MAY IT PLEASE THE COURT:

American Grocery Company et al, plaintiffs in the trial court have adopted the petition for writ of certiorari and brief of the Galveston Wharf Company in support thereof.

In the trial court judgment was rendered in favor of American Grocery Company et al, against the Galveston Wharf Company, and the Galveston Wharf Company and American Grocery Company et al, plaintiffs in the trial court, appealed from the judgment, American Grocery Company et al, complaining of the trial court's action in not rendering judgment in their favor against the Mallory Steamship Company and in not rendering judgment in their favor against the Galveston, Harrisburg & San Antonio Railway Company. In the Court of Civil Appeals and in the Supreme Court of Texas the American Grocery Company et al, plaintiffs in the trial court, by proper assignments, exceptions and motions, as shown by the record in this cause, objected to the decisions of the state court holding that the American Grocery Company et al, plaintiffs in the trial court, were not entitled to recover against Mallory Steamship Company and the Galveston, Harrisburg & San Antonio Railway Company. In the Supreme Court of Texas, as shown by the record, American Grocery Company et al, plaintiffs in the trial court, duly filed their motion for rehearing, objecting to the holding of the Supreme Court to the effect that the shipment at the time of the fire was not in possession of the Mallory Steamship Company as a carrier, and if it was not in the pos-

session of such steamship company as a carrier, in holding that the American Grocery Company et al, were not entitled to recover against the Galveston, Harrisburg & San Antonio Railway Company.

STATEMENT OF THE CASE

A full and complete statement of the case given by the Galveston Wharf Company in the petition for writ of certiorari is hereby adopted in full.

SPECIFICATIONS OF ERROR

I.

The Supreme Court of Texas erred in finding and holding that possession of the shipment at the time of the fire had passed from the Mallory Steamship Company to the Galveston Wharf Company, and in holding that the plaintiffs in the trial court were not entitled to judgment against the Mallory Steamship Company.

II.

The Supreme Court of Texas erred in finding and holding that the Galveston Wharf Company held possession of the shipment at the time of the fire as a connecting carrier and not as an agent

of the carrier named in the bill of lading, and in holding that plaintiffs in the trial court were not entitled to recover against the Galveston, Harrisburg & San Antonio Railway Company.

ARGUMENT

POINT ONE

The argument of the Galveston Wharf Company in its brief in support of the petition for writ of certiorari upon the proposition that possession of the shipment had not passed from Mallory Steamship Company to Galveston Wharf Company is hereby adopted.

POINT TWO

The argument of the Galveston Wharf Company in its brief in support of the proposition that if it held the shipment at the time of the fire, it held it as an agent of the Galveston, Harrisburg & San Antonio Railway Company is hereby adopted.

It is conceded by all parties to the cause that the American Grocery Company et al, plaintiffs in the trial court are entitled to recover against some one of the defendants in the trial court. The American Grocery Co. et al, take the position

that they are entitled to recover from some one of the three defendants in the trial court, Mallory Steamship Company, and Galveston, Harrisburg & San Antonio Railway Company; that a correct holding should fix the liability in this case against the Mallory Steamship Company, in whose possession the shipment was at the time of the fire; but in any event, such plaintiffs in the trial court are entitled to judgment against some one of the defendants in the trial court above named.

WHEREFORE, American Grocery Company et al, plaintiffs in the trial court, pray that this honorable court enter judgment in their favor against the carrier in possession of said property at the time of the loss and damage by fire, and for such other relief as it may be entitled to.

Counsel for American Grocery Co. et al

FRYER & CUNNINGHAM
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 411

THE GALVESTON WHARF COMPANY ET AL., *Petitioners,*

v.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL., *Respondents.*

BRIEF FOR RESPONDENT GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

JOHN P. BULLINGTON,
Counsel for Respondent,
G. H. & S. A. R'y Co.

BAKER, BOTTS, ANDREWS & WHARTON,
JESSE A. RAYMOND,
Of Counsel.

McCURDY-YOUNG CO., HOUSTON

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 411

THE GALVESTON WHARF COMPANY ET AL., *Petitioners,*

v.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL., *Respondents.*

BRIEF FOR RESPONDENT GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY

Opinions of Courts Below.

The opinion of the Texas Court of Civil Appeals is not officially reported but may be found in 13 S. W. (2nd) 983. The opinion of the Texas Commission of Appeals is not officially reported but may be found in 25 S. W. (2nd) 588. The opinion of the Supreme Court of Texas has not yet been officially reported but appears in 36 S. W. (2nd) 985.

Jurisdiction.

No question as to the jurisdiction of this court is made by this respondent.

Statement of the Case.

While the statement contained in the brief of petitioners is accurate in most respects, this respondent feels that certain inadvertent omissions therein render a somewhat fuller statement desirable. Our statement will be confined to matters occurring after the arrival of the goods at Galveston.

The petitioner Galveston Wharf Company owns approximately fifty-one miles of railroad in the City of Galveston, and is the only railroad serving the waterfront. None of the trunk lines serving Galveston have any rail connection with the waterfront except by the tracks of the Galveston Wharf Company. The Wharf Company owns a number of wharves and piers on the waterfront, one of which is leased to the respondent Mallory Steamship Company for its exclusive use (R. 57), and is commonly known as the "Mallory Docks" (R. 46). This is the sole freight depot of the Mallory Steamship Company in Galveston (R. 64), and was the wharf destroyed by the fire out of which this action arose. Inbound through shipments via the Mallory line destined for inland points were customarily handled over the Mallory Docks in the following manner: Less than carload shipments were unloaded from the vessel and placed upon the wharf in portions thereof reserved for the various rail lines (R. Ex. 80L). Carload shipments when taken from the vessel were not placed in any designated portion of the wharf, but were placed at the most convenient point to the place they happened to be stowed in the particular vessel (R. 43). (The shipment here involved was a carload shipment.) After the goods had been placed on the wharf a representative of the rail lines in company with a representa-

tive of the Mallory would check each shipment for broken packages. This check was for the sole purpose of determining what packages needed re-coopering, a duty undertaken by the Mallory, and the only check at this time taken as to the number or amount was with reference to the contents of the broken packages, and not as to the shipment as a whole. When the Mallory completed re-coopering a package it was again inspected by the representatives of the rail lines and the Mallory, and if found in shipping condition would be marked "O. K." by the representative of the rail lines (R. 53). Representatives of the Wharf Company would take shipments from the floor of the wharf in due course, giving preference to less than carload freight and perishable freight, and truck them into the cars of the respective rail lines standing within and alongside the wharf. When the goods were lifted from the floor by employees of the Wharf Company to be trucked into the cars, a joint check as to number or amount would for the first time be made. This check would be made by a representative of the Mallory and a representative of the Wharf Company, either as the goods were trucked into the cars or within the cars if the nature of the commodity permitted it (R. 58, 63-4). A receipt would be thereafter issued to the Mallory for the goods, which receipt was usually not actually delivered until some days later, but invariably bore the date the goods were actually checked and loaded into the cars and not the date the goods were unloaded from the ship (R. 55).

The Wharf Company, under its tariff, charged and received payment for three distinct services with reference to goods moving in the above manner: (1) a

wharfage charge based on weight and commodity paid by the Mallory Steamship Company in addition to the rental reserved under the lease contract, (2) a loading charge, paid by the rail line involved, for lifting the goods from the wharf and loading them into the cars, which charge was likewise based on weight and commodity, and (3) a switching charge of $4.05 for each car moved from the wharf to junction with the trunk line carrier (R. 57-58, 59-60; Ex. 86U).

Under these facts and the facts recited in the brief of petitioners the points urged by this respondent are:

(1) That under the undisputed facts there was no delivery of the goods from the Mallory Steamship Company to the Galveston Wharf Company.

(2) That even if a delivery had been made to the Galveston Wharf Company, that company held the goods as a common carrier and not as an agent of this respondent, and

(3) That the limitation of liability contained in the tariff of petitioner Galveston Wharf Company is by its very terms inapplicable under the facts of this case.

ARGUMENT

Point 1.

This respondent adopts the argument of petitioner in support of the proposition that as a matter of law there had been no delivery of the goods from the Mallory to the Wharf Company at the time of the fire. We would, however, call the court's attention to the fact that the undisputed facts enumerated by the Supreme Court of Texas as showing that there had been no delivery to the railroad are equally cogent in showing affirmatively that there had been no delivery to the

Wharf Company (R. 152-155). It is submitted that no fact issue was raised by the conclusions of witnesses that there "was nothing else to be done" by the Mallory or that the witness "considered" delivery had been made (R. 55). Certainly such conclusions may not raise a fact issue against positive and uncontroverted evidence that something more was done, to wit, that the goods were policed by employees of the Mallory Steamship Company (R. 51), and that the Mallory undertook the salvage of the goods after the fire (R. 76), and reserved the right to divert the shipment from one railroad to another at any time prior to the actual loading into the cars (R. 47). It is difficult to understand how the Mallory Steamship Company could exercise the control it actually exercised over the goods and undertake their protection and yet deny that the goods were in their possession.

The decisions of the courts below likewise overlook one further important consideration. It is well settled that for delivery by a carrier to be completed the party to whom delivery is to be made must be given seasonable notice and a reasonable time in which to remove the goods from the premises of the carrier after the goods are in condition for delivery. *Richardson v. Godard*, 23 How. 28; *The Mary Washington*, 1 Abb. 1, Chase, 125, Fed. Cas. No. 9229; *Unnevehr v. The Steamship Hindoo*, 1 Fed. 627; *Turner v. Huff*, 46 Arkansas 222; *Hill Manufacturing Company v. Boston, etc., R. Corp.*, 104 Mass. 122; *McAndrew v. Whitlock*, 52 N. Y. 40. Here the goods were not ready for delivery until approximately 4 p. m. of the day of the fire because of re-coopering done by the Mallory Steamship Company (R. 49). The usual and customary time for loading op-

erations to cease was 7 p. m. because cars loaded after that hour could not be placed in the evening trains of the trunk lines (R. 61). Under these facts it is respectfully submitted that a reasonable time for taking possession of the goods had not elapsed when the goods were destroyed, which is simply an additional reason to those above enumerated showing, as a matter of law, that possession of the goods remained with the Mallory until their destruction.

Point 2.

Petitioner Galveston Wharf Company concedes, as it must, that it is a common carrier but insists that if it was in possession of the goods at the time of their destruction it was not in such capacity but only as the agent of this respondent. Assuming such agency it is not perceived how it could affect petitioner's liability to plaintiff. Under the Carmack Amendment each connecting carrier is made the agent of the originating carrier, *Missouri-Kansas-Texas Railway Company v. Ward*, 244 U. S. 383, 388, yet such agency has never been suggested as a reason for denying recovery to a shipper against one of the connecting carriers in possession of the shipper's goods when they are destroyed.

It is true that petitioner was not named in the bill of lading and did not participate in the through rate but received only a fixed charge for its services. No case has been found, however, to indicate even the necessity of a bill of lading, much less mention therein, for a carrier in possession of goods to be liable for their destruction. All the decisions are to the contrary, *United States v. St. Joseph's Stockyards Company*, 181

Fed. 625 (reversed on different grounds, 186 Fed. 104); *Texas & Pacific Railway v. Henson*, 103 Texas 598; *Kansas City Southern Railway v. Rosebrook-Josey Grain Company*, 114 S. W. 436 (Tex. Civ. App.); *Joest v. Clarendon & Rosedale Packet Company*, 122 Ark. 353; *State v. Jacksonville Terminal Company*, 90 Florida 721; *Batchelder & Snyder & Company v. Union Freight Railroad Company*, 259 Mass. 368; *Fleming v. Kansas City Suburban Belt Ry.*, 80 Mo. App. 129; *Sesser v. Chicago I. & M. Ry.*, 267 Ill. 418; *Missouri Pacific Railway v. Wichita Wholesale Grocery Co.*, 55 Kansas 525; *State v. Union Stockyards Co.*, 81 Neb. 67, and it is expressly provided in Section 20 (11) of the Transportation Act that:

> " * * * any common carrier, railroad, or transportation company delivering said property so received and transported, shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, *whether such receipt or bill of lading has been issued or not*, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading. * * *"

The Massachusetts Supreme Judicial Court held in *Batchelder & Snyder & Company v. Union Freight Railroad Company, supra*, that a switching carrier was liable to the shipper for goods injured while in its possession even though it was not mentioned in the bill of lading and did not participate in the through rate. A similar holding, under similar facts, was made by the

Supreme Court of Kansas in *Missouri Pacific Railway v. Wichita Wholesale Grocery Co., supra,* and it was also expressly held that the fact that the switching charge was paid by another carrier did not affect its liability to the owner of the goods.

In considering this question, the physical situation at Galveston must be borne in mind. The Wharf Company is the sole rail connection between the waterfront and the termini of the rail lines entering Galveston. Goods coming over the Mallory docks are carried some two and one-half miles by the Wharf Company to the rail connections. The Wharf Company's lines are the only means of rail connection on rail-water movement through the Port of Galveston. This very situation has been recognized by the Legislature of the State of Texas, since, in Article 1491, Revised Civil Statutes of Texas, 1925, it is provided:

> "Any railroad, or other means of transportation, which may be constructed between the mainland and any deep water harbor or channel shall be a public highway. All rates and charges for the transportation of freights and passengers thereon shall be subject to the control and regulation of the Railroad Commission as a railroad. Such railroad or other means of transportation shall receive from each ship, boat and vessel, or from the wharf on which the same is discharged, all freights and passengers, and transport and deliver them to the consignee, or any connecting line of railroad, without discrimination as to charges or delay in transportation and delivery, and shall in like manner receive from every person and from every connecting line of railroad, all freight and passengers, and transport and deliver the same to each and every ship, boat, vessel, person or corporation for delivery to such ship, boat or vessel on like equal and

just terms, without discrimination as to charges and delay in tranportation or delivery thereof."

Even though the shipment here involved is interstate, this statute is relevant as showing the *character* of the Wharf Company, it being situated entirely within the State of Texas. Under its provisions the Wharf Company is plainly made a common carrier, not only as to plaintiff, but as to this respondent. By its terms the Wharf Company, in operating the link between the rail and water carriers in rail-water shipments, is bound to serve the rail and water carriers in this connection as a common carrier. There is nothing new or novel in one common carrier occupying the relation of common carrier to another. That such relation could exist was early held by the Supreme Court of Illinois, in *Peoria & Pekin Union R. Co. v. Chicago, R. I. & P. R. Co.*, 109 Ill. 135 (1884), and nothing to the contrary has since appeared. To hold in this case that the Wharf Company was merely the agent of this respondent and that the latter alone is responsible to plaintiff, would mean that a railroad would be held liable, finally and completely, for the destruction of a shipment it had never even seen or had an opportunity of inspecting as to weight and number. It would also mean that the Wharf Company could enjoy all the privileges and immunities of a common carrier, including the unusual one of absolute freedom from competition, without suffering any of the liabilities to which other common carriers are subject. In no case where it handled goods in transit would it ever be liable, if not here, for its contention when analyzed means that in such handling it is always acting as agent of some other carrier, and never on its own responsibility.

Petitioner seeks support for its position in the case of *Missouri Pacific Railway Company v. Reynolds-Davis Grocery Company*, 268 U. S. 366, involving the shipment of a carload of sugar from Raceland, Louisiana, to Fort Smith, Arkansas. The bill of lading and the through rate covered delivery to the warehouse of the consignee in Fort Smith, a point not reached by the lines of the Missouri Pacific, named in the bill of lading as the delivering carrier. The St. Louis & San Francisco served the warehouse of consignee, and it was employed by the Missouri Pacific to do the necessary switching for delivery. The goods were destroyed while in the possession of the St. Louis & San Francisco, and the consignee filed suit to recover the loss against the Missouri Pacific as the delivering carrier under the bill of lading. The Missouri Pacific sought to avoid liability to plaintiff on the ground that it had performed its duty under the bill of lading by delivery to the next connecting carrier, and was, therefore, not liable. Under these circumstances, it was properly held that the Missouri Pacific, having contracted to deliver the goods to the warehouse of consignee, could not escape liability under the contract by delegating its obligation to another, and so far as the owner of the goods was concerned, the St. Louis & San Francisco was merely the agent of the defendant Missouri Pacific. It was neither held nor suggested that plaintiff could not have recovered against the St. Louis & San Francisco had the plaintiff elected to sue it, and the case is therefore not at all in point here. The owner of the goods in the present case might have proceeded against the originating carrier under the Transportation Act, and have recovered without the necessity of showing in

whose possession the goods were at the time of their destruction. [The transactions involved in this case took place before the Amendment of 1927 placed liability on the delivering carrier also, Section 20, (11), 44 Statutes at Large, 1669.] Instead, the owner elected to file suit against three carriers, including the Wharf Company, alleging that one was in possession of the goods at the time of their destruction, and seeking recovery against the carrier in possession. The Supreme Court of Texas found that the goods were in the possession of the Wharf Company as a common carrier, and the owner of the goods having sought recovery against that company, the judgment of the trial court against it was correct. If possession was properly placed below it is respectfully submitted the judgment rendered is correct and should be affirmed.

In passing it may be remarked that if the Wharf Company was acting as agent of anyone with reference to the goods when they were destroyed it was as agent of the Mallory Steamship Company. The goods at the time of the fire were on a movement for which a tariff charge was paid by the Mallory Steamship Company—that of wharfage (R. 59-60). It is undisputed that the Wharf Company had not at such time taken any action with reference to the goods for which a charge would have been made against this respondent and none was ever assessed or paid (R. 62). The obligation of the Mallory under the bill of lading was to deliver the shipment to "another carrier on the route" and there was none on this respondent to come and get the shipment (R. Ex. 80A). The movement across the wharf was a part of the movement toward delivery to "another carrier" and if payment for service makes

agency then the agency was between the Mallory Steamship Company and The Galveston Wharf Company, since the goods at the time were on a movement for which the Mallory paid the Wharf Company.

Point 3.

Petitioner Galveston Wharf Company relies upon the following provision in its tariff as relieving it of liability here:

> "Under the rates named in Items Nos. 40, 42, 48 and 50, the Railroad Company from which freight is received, or to which freight is delivered, shall be liable for all loss or damage occurring to freight on lines of this Company, other than through the negligence of this Company, and this Company will not be liable for any injury to cars while in its possession, except through its own negligence" (R. Ex. 86D, Item 6C).

We do not understand counsel for the Wharf Company to contend that this provision binds the plaintiff below, but if such contention is made the answer is plain—(1) the provision does not purport to bind plaintiff, and (2) a carrier having notice that goods are moving on a through bill of lading cannot alter the terms of the contract by attempting to impose new and additional provisions for the movement on its lines. *Kobb v. Brown,* 193 Fed. 958.

In so far as this respondent is concerned the provision is by its very terms inapplicable. It applies only "under the rates named in Items Nos. 40, 42, 48 and 50." These items fix rates for switching loaded cars from various points to others (R. Ex. 86U). Before these goods would have reached the stage where the ser-

vice covered by Items Nos. 40, 42, 48 and 50 would apply another service provided in the tariff would have to be performed—the loading from the wharf into the cars (R. Ex. 86V, W and X). Thus, at the time of the fire the goods, if in the possession of the Wharf Company, were not in its possession "under the rates named in Items Nos. 40, 42, 48 and 50" but were in its possession under the rates named in Item No. 144 (R. Ex. 86V). Furthermore, the uncontroverted testimony of the General Manager of the Galveston Wharf Company is that petitioner "had not begun to start the service they were going to be paid for by the G. H. & S. A" (R. 62). Thus the petitioner's argument that when a service is performed under the tariff the tariff becomes the contract between the parties is of no avail since such service was not performed nor begun to be performed at the time of the fire.

In addition to the foregoing the limitation is expressly confined to "loss or damage ocurring to freight *on the lines of*" the Wharf Company. These goods were destroyed on the wharf of the Mallory Steamship Company.

We do not find it necessary here to invoke the familiar rule that limitations of liability contained in contracts with carriers are to be strictly construed.

Conclusion.

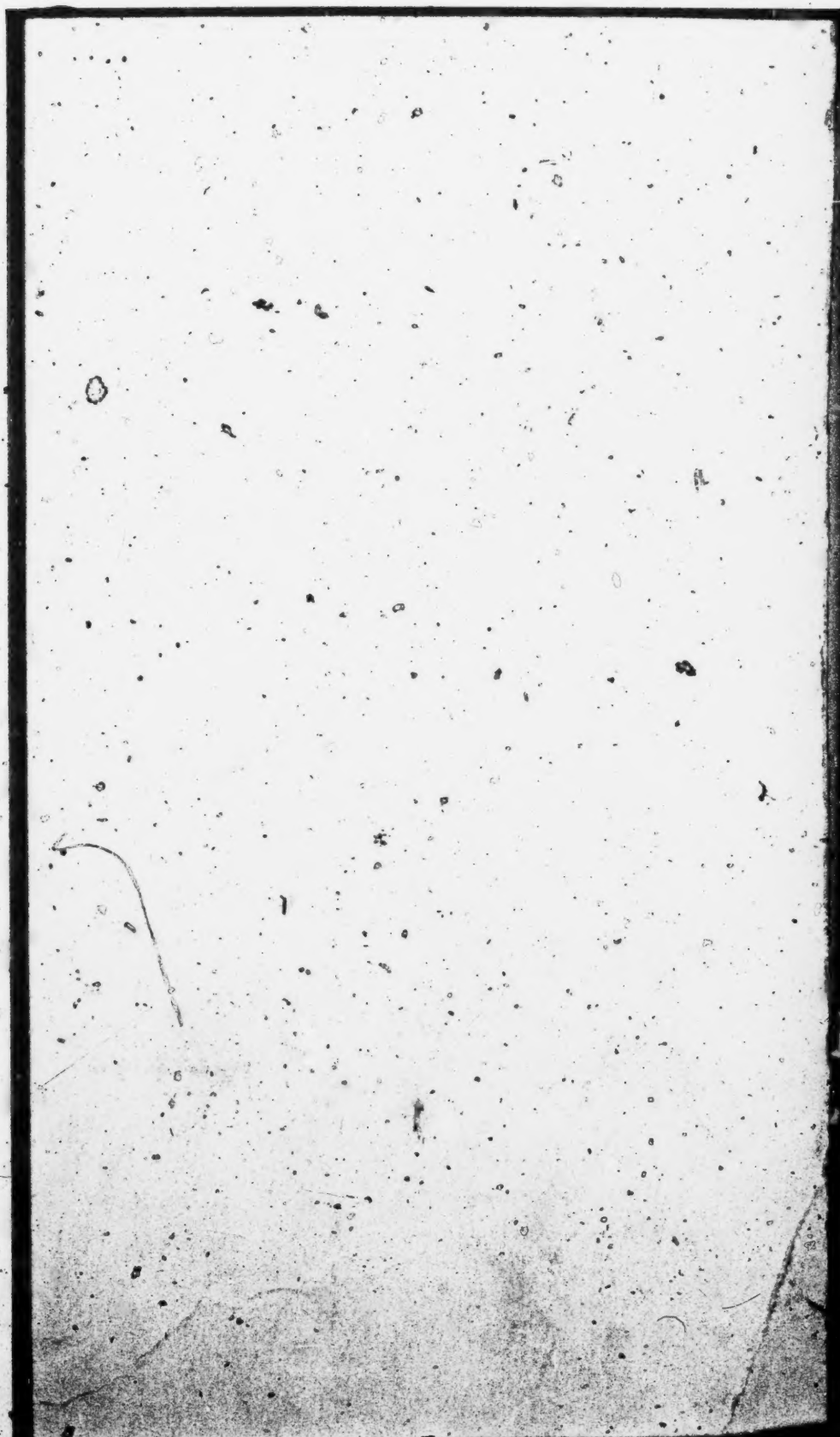
To hold this respondent liable for the destruction of the shipment involved in this case at a time when their protection had been undertaken by the Mallory Steamship Company and before this respondent had ever had an opportunity to check them, would result in a manifest injustice, and this petitioner prays that the

judgment below, in so far as it relieved this respondent of liability, be affirmed.

Respectfully submitted,

JOHN P. BULLINGTON,
Counsel for Respondent,
G. H. & S. A. R'y Co.

BAKER, BOTTS, ANDREWS & WHARTON,
JESSE A. RAYMOND,
Of Counsel.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 411.

THE GALVESTON WHARF COMPANY ET AL., *Petitioners*,

v.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL., *Respondents*.

SUPPLEMENTAL BRIEF FOR RESPONDENT GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY IN REPLY TO BRIEF OF MALLORY STEAMSHIP CO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

JOHN P. BULLINGTON,
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BAKER, BOTTS, ANDREWS & WHARTON,
KEMP & NAGLE,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 411.

THE GALVESTON WHARF COMPANY ET AL., *Petitioners*,

v.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL., *Respondents*.

SUPPLEMENTAL BRIEF FOR RESPONDENT GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY IN REPLY TO BRIEF OF MALLORY STEAMSHIP CO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

May it please the Court:

Respondent, Mallory Steamship Co., has taxed this respondent with having, in its brief, incorrectly stated the record in several respects. This respondent respectfully submits that the error lies with the Mallory Steamship Co. and not with it.

Alleged Error One.

The lease agreement between Mallory Steamship Co. and Galveston Wharf Co. is set out in full as an exhibit in the record and speaks for itself (R. Ex. 81).

It is again submitted that this is but a simple lease for the exclusive benefit of the Mallory Steamship Co. and its affiliated lines reserving to the lessor only the right to allow others the use of any portion of the wharf not actually being used by the Mallory. That the Mallory allowed employers of the rail lines and of the Wharf Co. to work on the wharf no more affects the exclusiveness of the Mallory's possession than would the presence of guests in a hotel being operated under a lease similar to that here involved affect the possession of the hotel company.

Alleged Error Two.

Counsel for the Mallory has failed to distinguish between the handling of carload shipments and the handling of less than carload shipments. The latter were handled in the same manner as described in *Pratt v. Railway Co.*, 95 U. S. 43, that is to say, there was a separate marked and invariable location on the wharf where such shipments were placed for each of the rail lines entering Galveston. This is shown by the drawing of the wharf (R. Ex. 80L) identified and explained by the superintendent of the Mallory (R. 46). Carload lots, on the contrary were not placed on any portion of the wharf reserved separately for the various rail lines but, as stated by the Mallory's own superintendent:

"As to who designates the place on carload shipments, it is understood and agreed that they be discharged opposite the part of the ship where they are stowed. A shipment stowed in the forward end of the ship is discharged opposite the forward end and shipments in the aft end are discharged opposite the aft end. There is a division line, and we do not go forward of that division line with the forward end and aft end (*sic*) with freight." (R. 43.)

An examination of the sketch above referred to (R. Ex. 80L) shows the location of this and other carload shipments on the wharf on the right of the fire and shows conclusively that in no case were carloads placed in the space regularly allotted to the various railroads for the less than carload freight.

In reading the testimony quoted on pages 5-8 of respondent Mallory's brief confusion will be avoided by bearing in mind that the place on the wharf "designated" for less than carload shipments was fixed and did not change with the arrival of goods from different vessels while the place "designated" for carload shipments (such as is here involved) varied with each vessel according to where the shipment was stowed. The place for unloading such shipments was not "designated" until the arrival of the vessel. This, of course, presents an entirely different situation from that existing in *Pratt v. Railway Co., supra.*

Alleged Error Three.

On page 8 of his brief counsel for respondent Mallory states that a joint check of the goods was not made at the time the goods were lifted from the floor to be loaded into the cars. The only positive testimony on the point is by the Mallory's chief clerk

who said that "whenever the Galveston Wharf Co. gets ready to pick up a carload at Pier No. 24 and put it on a car, they take a copy of the billing, *accompanied by a clerk of the Mallory,* and check those carload lots as *they* pick them up and take them over to the car." (R. 55) Counsel for respondent Mallory infer from some other testimony of this witness that he did not mean what he thus stated directly as a fact. The Supreme Court of Texas evidently understood him to mean what he said, as this very testimony was quoted in the opinion (R. 154) as the basis of one of its reasons for finding no delivery had been made to the railroad. It is also true that the goods were sometimes checked inside of the cars but it is difficult to see how this has any bearing on whether the check was joint or not.

On page 9 of respondent Mallory's brief exception is taken to the statement in this respondents' brief that receipts for goods were issued "as of the date and hour" of picking up the shipment. The basis for the statement contained in this petitioner's brief is the testimony of the Mallory's superintendent who said:

> "It is a fact that when the Galveston Wharf Company picked up carload shipments to be taken by it and loaded on the cars of the railroad, the Wharf Company would give a receipt to the Mallory Line *as of the date and time* they picked the freight up off the wharf on Pier No. 24 to take over to the cars." (R. 49)

In any event the point is not material since it is undisputed that the receipts were always given as of the *date* of loading into the cars and not as of the

date of discharge on the wharf and that had the fire not occurred the receipt for these goods *would have been dated the day after the fire.*

The matter of checking is not "unimportant" as asserted, but on the contrary most important because it was the only possible way of learning what the Mallory was delivering and in addition the uniform practice acquiesced in by all parties for years sheds a great deal of light on the general understanding of *all* as to when delivery was effective.

Errors in Brief of Mallory S. S. Co.

(1) In section I, page 26, of the Mallory S. S. Company's brief it is stated that that company's superintendent testified with reference to diversion *only*: "We would have endeavored to have a diversion." This entirely omits this gentleman's statement in the next two sentences of the record that:

> "*We would have reconsigned it* for the accommodation of the consignee. *After the goods had actually been loaded in the freight cars,* and we had received the diversion or reconsignment order, *the shipment would have been beyond our control.*" (R. 47)

Of course it is correct that if the billing had gone to the railroad at the time the order had been received the billing would have to be gotten from the railroad, but its delivery could not have been legally refused. According to the same witness of the Mallory above quoted, in amplifying his description of the procedure, whether or not the Mallory would get the billing and effect the diversion depended "on whether or not the Wharf Company has functioned in the meantime

[*i. e.*, between receipt of the order and request for the billing].'' (R. 49)

(2) It is stated (p. 27) that the Mallory simply paid part of the policing of the goods because it had other goods on the wharf in which the Wharf Company was not interested. In support of this statement the provision of the lease requiring the Mallory to ''pay the salaries of sufficient police watchmen to protect the property hereinabove described and also to pay its pro rata of the expense of one day and one night police sergeant'' is quoted.

The police sergeant referred to was in charge of all the wharf police watchmen on the entire waterfront and the pro rata provision had nothing to do with other goods on the Mallory wharf but was put into the lease because the sergeant served many other steamship companies while the police watchmen on the docks of the Mallory, whose full salaries were paid by the Mallory, served that company alone.

(3) This respondent denies that any loaded cars were burned as stated on page 28 of the brief and further asserts that the Mallory did not undertake the salvage of anything belonging or appertaining to this or any other railroad. If, as asserted by the Mallory, the salvage was undertaken, not on its own behalf but on behalf of someone else and only because ''some one should undertake the salvage'' the salvage realized from these goods would have been tendered into court and not retained by the Mallory as was actually done.

In closing we respectfully call the court's attention to the fact that all the cases cited and discussed under ''Second Point'' (p. 19 *et seq.*) of respondent Mallory's brief deal with the transfer of shipments

under circumstances showing an agreement, express or implied from a course of conduct, that a deposit of goods at a certain place would constitute delivery which is not the situation here. Certainly there was no express agreement and the only implied agreement which can be inferred from the conduct of the parties both before and after the fire is that delivery was made at the time the goods were picked and loaded into the cars.

Respectfully submitted,

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FIRST POINT 15

The fact finding of the trial court that the Steamship Company had made due delivery of the sardine shipment to the Wharf Company is sufficiently supported by evidence.

SECOND POINT 19

The authorities support the finding that the Steamship Company made due delivery and the conclusion that it was relieved from liability.

THIRD POINT 25

The circumstances mentioned by the Wharf Company and the Railroad Company do not impair the finding of the courts below that delivery was made by the Steamship Company.

I. Concerning wharfage.
II. Concerning diversion.
III. Concerning policing.
IV. Concerning salvaging.
V. Concerning notice of readiness.

FOURTH POINT 29

The Wharf Company in receiving delivery from the Steamship Company acted either as the agent of, or as a sub-contractor for, the Railroad Company and the Steamship Company was by such delivery relieved of further responsibility in respect of the shipment.

LAST POINT 31

It is respectfully submitted that the decision of the Supreme Court of Texas should be affirmed with costs in so far as it relieves the Steamship Company from liability.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1931

No. 411

GALVESTON WHARF COMPANY, *et al.*
Petitioners

AGAINST

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY, *et al.*
Respondents

BRIEF FOR RESPONDENT MALLORY STEAMSHIP COMPANY

TRIAL COURT FINDINGS

The trial court found as a fact (trial by jury having been waived) that the Steamship Company had made delivery of the shipment to the Wharf Company. See "Findings of fact and conclusions of law", R. 21-29. This finding was not disturbed, but was affirmed in the Court of Civil Appeals and in the two hearings in the Supreme Court of Texas. The Supreme Court of Texas appears to have regarded the fact findings of the trial court as binding on the several Appellate Courts, for it said (R. 155):

"If the Court of Civil Appeals undertook to substitute its findings of fact for the findings of fact made by the trial court and render final judgment thereon, it would not be authorized to do so, if there was any evidence in the record to sustain the finding made by the trial court."

It also said (R. 148):

"The Wharf Company contends that it should be held under the evidence introduced that, as a matter of law, no delivery of the shipment in controversy was made by the Steamship Company to the Wharf Company. To this contention we cannot agree. We think the evidence raises a fact issue to be determined and the trial court found that a delivery had been made by the Steamship Company to the Wharf Company.

Under the state of the record, we do not think it can be said, as a matter of law, that there was no evidence of any probative force to sustain the findings of the trial court. It can only become a question of law when the facts and circumstances are such that but one reasonable conclusion can be drawn therefrom."

We respectfully submit that the fact of delivery by the Steamship Company to the Wharf Company as found by the trial court and thereafter three times affirmed stands in this Court, and is not subject to further review.

On the facts thus definitely found the judgment below is correct as to the Steamship Company, relieving it from liability. It is not the concern of the Steamship Company whether the judgment is correct in imposing liability on the Wharf Company as distinguished from the Railway Company.

Plaintiff Adopts Wharf Company's Petition

We note that the plaintiff, American Grocery Company, adopts the petition of Galveston Wharf Company and brief in support thereof (Petition, p. 12, Brief, p. 19). In the Court of Civil Appeals plaintiff prayed the court "to affirm the judgment of the trial court", and alternatively for judgment against the other defendants (R. 38). The petition prays (p. 12) for reversal of the judgment of the Supreme Court of Texas (R. 160) affirming the judgment

of the Trial Court (R. 19), which awarded the plaintiff $5,376.25 against the Wharf Company, and dismissed the complaint as against the Steamship Company and the Railroad Company (R. 20). Thus the plaintiff would appear to have consented here to reversal of the money judgment in its favor against the Wharf Company, but plaintiff has not petitioned in its own right for reversal of those portions of the judgment below which dismissed its claim as against either the Railroad Company or the Steamship Company. The Wharf Company is necessarily only interested in securing reversal as against itself of the plaintiff's recovery against it, not in imposing liability in favor of plaintiff against the other defendants. It may be a question whether adoption by the plaintiff of the Wharf Company's petition benefits the plaintiff, or enables it to secure any relief transcending that secured by the Wharf Company. The consequence of this position is possibly like that stated in *Federal Trade Commission* v. *Pacific Paper Assn.*, 273 U. S. 52, 66.

Errors in Brief for Railway Company

I. Brief for the Railway Company is incorrect in stating (p. 2) that one of the piers of the Galveston Wharf Company "is leased to the respondent Mallory Steamship Company for its exclusive use". The agreement of July 1, 1914, between the Wharf Company and the Steamship Company (R. 81-86) shows that the Steamship Company was not to have exclusive use of the pier, and the evidence shows that it did not in fact have such. We now refer briefly to this evidence.

The Steamship Company's Dock Superintendent testified that the Wharf Company also used the wharves for other purposes besides handling shipments for the Mallory Line (R. 45). The Steamship Company, Wharf Company and

Railroad Company each had a set of clerks on the dock and the Steamship Company and Wharf Company each had a force of laborers (R. 53). The Wharf Company and Steamship Company had adjoining offices on the wharf (R. 53). The Wharf Company had an average force of 150 laborers there (R. 72).

The Wharf Company's General Manager testified (R. 75):

"The property is ours, but it is allocated to the Mallory Line. Our forces worked there in the performance of the duties for the account of the rail lines, in picking up this stuff and loading into cars and unloading from cars, and placing in their northbound berths for loading into their steamers. Our clerks have offices there. We have representatives and clerks on every pier."

The Wharf Company's railroad tracks were on the pier and the services it performed for the railroads in receiving and loading the cars were being performed by it on the pier. The pier was not therefore in the exclusive occupation of either the Steamship Company or Wharf Company, but they were occupying and using the same for their respective purposes (R. 48 and Ex. B, R. 80 L).

The Railroad Company also had an inspector on the pier whose duty it was to inspect the shipments when landed and if any were damaged to supervise putting the same in order by the Steamship Company and stamp his O. K. thereon to indicate that they were ready to go forward. (R. 52-53, 78).

II. Brief for the Railway Company further errs in stating (p. 2):

"Carload shipments when taken from the vessel were not placed in any designated portion of the wharf, but were placed at the most convenient point to the place they happened to be stowed in the particular vessel."

It was the understanding and practice of many years that carload shipments should be placed by the Steamship Company in piles in a designated territory on the wharf convenient to the empty cars placed there on tracks for loading the same; and that after a shipment had been so placed and any "out of order" packages put in condition by the Steamship Company and stamped O. K. by the Railroad Company's inspector, the Steamship Company was through and had nothing further to do with or control over the shipment; the Wharf Company then without further permission, notice or action on the part of the Steamship Company picked up and loaded the same into cars as found convenient in the course of the work of loading out the steamer's cargo. The Wharf Company had a force of 150 men on the Wharf to do this work and it was generally begun as soon as there was sufficient cargo out of the ship to start on.

The Steamship Company's dock superintendent testified (R. 44):

"Our force unloaded the vessel and put the shipments at convenient places on the wharves as designated. Assuming that there are no broken packages, we do no further handling of a shipment. The Galveston Wharf Company does. Relative to the time when we have placed our shipment at the designated places on the wharves, so far as the Mallory Line is concerned, the Wharf Company may load it out immediately."

And at R. 45:

"In the usual and customary handling of freight over the wharf from the vessel, after we have placed a shipment at the designated point on the wharf, the only thing else, if anything, the Mallory Line has to do with the shipment is to repair the bad order packages. Assuming that there are no bad order packages, we have nothing further to do with it."

Further, at R. 50:

"The Mallory Line has no control whatever over the employees of the Wharf Company who handle these shipments from the place on the dock to the car. We give them no directions."

The Steamship Company's chief dock clerk testified that (R. 51-52):

"I remember this shipment of sardines. It was unloaded from the boat that day and placed on the wharf. As you come out of the conveyor, it was placed south of the gang-way about 60 feet from the conveyor, I would judge. As you come out of the ship, you go west, and it was placed south of the gang-way, where we generally place car-load shipments on the dock. We have an electric conveyor. As soon as the shipment comes off the boat, it gets on that and is automatically carried to the designated place. This shipment was so placed on that day. Trucks came off the conveyor and took it to the pile and unloaded it in a pile on the dock. I remember it was on dock in the early afternoon. I could not tell the exact time. I judged it was before 2:00 o'clock. This was a car-load shipment. After we placed the shipment in the designated territory, that is all we have to do with it. If we have broken cases, we set them aside, and the Mallory Line coopers come along and put them into condition, and we are through with it, and it is ready for the Wharf Company to load out. The Wharf Company does the loading of the cars from the place we put it. We have no voice in saying when they shall do that. They do that at their own pleasure and convenience."

The Wharf Company's general manager was in full accord with the foregoing, and testified (R. 67-68):

"As to a space being assigned on the wharf where they separate the carloads from LCL, I will say that that is attempted. There is an imaginary line where they attempt to deposit the checked freight, *make such delivery,* [Italics ours] and the carloads are usually placed by the Mallory to their best advantage. When I say that, the Mallory of course knows that it is more expensive to truck a shipment a longer distance, and they will make a short cut and cut

that down as much as possible. They have electric conveyers but the custom there is to place the cargo in certain places as much as possible. There is, in a general way at least, a kind of assigned territory there for different rail lines. The cars are spotted opposite in the same manner. * * * Our forces are at liberty to begin the loading as soon as the freight is put on the wharf, but the practice is to wait until there is a sufficient amount deposited there to keep the labor busy. Otherwise, it is not a paying investment. It is our privilege to begin loading as soon as it is put on the wharf, unless a hold order is put on some specific shipment which happens only occasionally. So that as soon as freights were deposited on the wharf by the forces of the Mallory, there was nothing to prevent our forces from immediately picking it up and trucking it to the cars. That was all left to the judgment and discretion of the Galveston Wharf Company's supervisor of forces on the docks. It was not a matter within the control of the Mallory Line. * * * The Railroad Company knew of freights that were coming routed by their lines and they were supposed to have cars in there. That matter is handled in advance. Our men, with our yard office, orders for this equipment. If we have not the cars in the yard they are delivered to us by the interested Bay Line and we spot this equipment in accordance with the instructions of the dock department. We try to spot these cars that take out SP freight on the tracks that are most convenient to pick up the freight that goes out on that line. On the day of the fire these cars had been spotted in the usual manner and the cars were there. As the freights were placed on the wharf by the Mallory Line it was purely a matter of the Wharf Company to determine just how and when to load the particular shipment in the usual manner. I have testified that we tried to give preference to perishable and likewise to freights that we had noticed were regarded as rush orders, so that if we had a shipment that was designated as a rush shipment we would endeavor to give that prior good handling to insure dispatch and satisfy customers."

He further testified (R. 70):

"It is the Mallory Line's usual performance to deposit it on the floor and it is picked up and loaded into the cars by the Galveston Wharf Company. As to the particular time it is picked up that is wholly in the control of the Wharf Company. After it had been placed and it was ok'd to go we

were at liberty to pick it up and send it forward at any time we got ready and it was not necessary for us to ask permission of the Mallory Line about it."

He also said (R. 72):

"I think the record shows that on the day of the fire we had about 150 men at work. That was about the average force. We used them right along because they had become efficient in the service and knew what was expected of them."

III. Brief for the Railway Company is further inadequate in its description (p. 3) of the procedure as to checking and receipt. The matter of receipts was dealt with in Finding XI of the trial Court (R. 27).

On the subject of check of the shipments the Steamship Company's dock superintendent testified that in unloading from the ship their men checked the shipment as to identification marks, location on the ship and its place on the dock (R. 44); that the carload shipments were checked from the piles into the cars by the Wharf Company and "not by the Mallory Line on that date" (R. 49); that the LCL shipments are checked by the Steamship Company to the pile (R. 51). He further testified (R. 55) that when the Wharf Company gets ready to pick up a carload "they take a copy of the billing, accompanied by a clerk of the Mallory, and check those carload lots as they pick them up * * *." "As to whether we depend on the Wharf Company to check we place them on the dock and consider that our delivery". Apparently this does not mean that there was a joint check in view of this witness' previous statement.

The general manager of the Wharf Company testified (R. 58):

"The general practice in vogue and it has been that way for years, is that the Mallory Line checked the LCL shipments and also the carloads in part what they can as it is

unloaded from the ship. Now that is put on the piers in certain piles and it is checked up from these various and sundry piles by the Wharf Company's forces and checked from such piles by our check clerks, and with reference to the carloads, they are also checked when they are lifted from the piles by our check clerks. In some instances the check is made *after the commodities are loaded in the cars,* [Italics ours] that being dependent upon the nature of the cargo permitting such practice."

And at R. 60:

"After we get the billing and it shows so many sardines being unloaded we do not take that billing as evidence of what we are going to pick up and take to the GH. & SA. We make a check on carload lots. That check is made when it is loaded. At the time of its loading in the cars and the same is true of the LCL."

No reference is made by him to a *joint* check, or a check by the Steamship Company from the piles to the cars. There would hardly be any occasion for joint check.

On the subject of a receipt from the Wharf Company for goods loaded, it appears that a receipt would be given by the Wharf Company in behalf of the railroad as of the date, but not of the hour, when the goods were lifted from the pile for loading into the car (Finding XI, R. 27, 55). The Petition is not correct in referring (p. 4) to receipt "as of the date *and hour*" of picking up the shipment. The reference to the Record does not support this. On the contrary, the evidence at R. 55-56 is:

"The receipt would not show the time the Galveston Wharf Company took the freight off the wharf and took it to the cars. It would show the date it loaded it out * * * ."

The receipt was never a condition of the loading of the shipments into the cars, however, and would not be received by the Steamship Company until some days later. It was for the purpose of a record of what was in the pile in the case of loss and damage claims at destination (R. 44-45, 50, 70).

The whole matter of checking, however, is relatively unimportant. It is evident that the purpose was to determine what was in the pile, the assumption being that that was what the Steamship Company had delivered. It even appears that the check was sometimes made by the Wharf Company in the car after the goods were loaded in the car, which would concededly be after delivery had been made, and that the Railroad receipt would then be based on the check after loading into cars (R. 64). It was obviously a practice of convenience having no particular reference to the technical question of delivery. Receipts were never received by the Steamship Company until long after the cars had been loaded out and were gone.

IV. It is not correct, as stated by brief for the Railroad Company (p. 5) that the Steamship Company "reserved the right to divert the shipment from one railroad to another at any time prior to the actual loading into the cars". We shall refer to this later.

STATEMENT OF FACTS

In addition to the facts necessarily stated in the foregoing comment, there are other facts which are pertinent and essential to proper understanding of this case.

WHARF AGREEMENT

There was an agreement (sometimes referred to in the testimony as a lease) in effect between the Steamship Company and the Wharf Company (Ex. C. R. 81) by which the Wharf Company, in consideration of an annual payment of $5,000 by the Steamship Company, agreed (R. 82) to

"permit and allow the Steamship Company and its affiliated lines to berth its and their vessels alongside of piers numbered 23, 24, 25, 26 and 27 in the City of Galveston, as now constructed, and to load and unload its and their vessels from and into the sheds and warehouses on said piers and to have the use of all sheds, warehouses and other structures upon or appurtenant to said piers or space and any and all improvements and additions thereto".

This arrangement was provided to be subject to the following conditions (R. 82-83):

"In the event at any time * * * the berthing and shed capacity adjacent to and on said piers * * * are not in use to their full capacities by the Steamship Company, or its affiliated lines, the Wharf Company retains and is hereby given the right to permit and allow any other person or corporation to use so much of said berthing and warehouse space as is not in use by the Steamship Company, or its affiliated lines".

"It is distinctly agreed and understood that the payment of the said sum of Five Thousand and 00/100 Dollars ($5,000) per annum hereinabove provided for is to be made as shed hire, and in addition thereto, the Wharf Company shall be entitled to collect from the Steamship Company and the Steamship Company will promptly pay to the Wharf

Company the regular wharfage and other rates and charges specified in the tariffs published or hereafter to be published by the Wharf Company for all goods, commodities, wares and freight loaded into or out of vessels of the Steamship Company, or its affiliated lines, which shall berth at said piers, and will comply with all rules shown in such tariffs".

The Wharf Company agreed to keep the piers, sheds, etc., which were the subject of the contract, in good repair and condition and it was agreed (R. 83) that the Wharf Company

"shall in no way be responsible for any loss or damage to any goods or cargoes handled over and through said wharves, sheds and warehouses, unless same be caused by defect in roof of warehouses, * * *"

The trial court held that the Steamship Company did not by this "assume responsibility for the loss of goods which were * * * in the possession of the Wharf Company" (R. 29).

"The salaries of sufficient police watchmen to protect the property hereinabove described" were to be paid by the Steamship Company and a *pro rata* of the expense of one day and one night police sergeant (R. 84).

In addition to its through traffic which the Wharf Company received and loaded out for the railroads the Steamship Company handled over the wharves its local traffic which the Wharf Company did not handle (R. 64).

WAYBILL

The shipment of sardines arrived at Galveston by the steamship *Concho* of the Mallory Steamship Company early in the morning of January 13, 1926, and the vessel was berthed at Pier 24, began to discharge at about 8:30 A. M. and finished at 5:30 P. M.

About two days previous to the arrival of the *Concho* the waybill (Ex. E, R. 86 CC) giving all requisite information as to the shipment of sardines, was furnished to the Wharf Company and by the latter to the Railroad Company so that the Railroad Company and the Wharf Company were advised that the shipment of sardines was on the steamer routed over the Railroad Company's line to El Paso, Texas, with the weights and quantities and other particulars. In consequence, the evening before arrival of the *Concho* empty cars for this and certain other shipments routed to go out over the Railroad Company's line were furnished by the Railroad Company and hauled down by the Wharf Company and spotted on the wharf at a point convenient for loading the cargo when discharged from the steamer (R. 42, 53, 67).

Loading other shipments into cars

During the day of January 13 as soon as sufficient cargo was out the Wharf Company began picking up the placed shipments and loading them into the cars, employing 150 men on this work (R. 72). This was the regular practice (R. 59).

The ship was fully discharged by 5:30 P. M. and out of the 1081 tons discharged and placed in the designated territory all but 379 tons were lifted and loaded by the Wharf Company as a matter of course without any notice, request or other action on the part of the Steamship Company (R. 43, 44). There were two other carloads routed by the same Railroad Company which were placed on the wharf in approximately the same location as the sardines and about the same time. These were picked up and loaded by the Wharf Com-

pany as a matter of course without any permission of the Steamship Company (R. 45, 47). When asked why the third car was not loaded the general manager for the Wharf Company answered, "It just so happened, I guess" (R. 74).

The Steamship Company's witnesses testified that the *Concho* had only two-thirds of a cargo, 1081 tons out of an an average cargo of 1500 tons (R. 44, 50) and that the sardines could and should have been loaded out the same day if the Wharf Company's forces had not been diverted to other work (R. 44).

This shipment of sardines was discharged from the ship and placed in a designated territory between 2 and 3 P. M. January 13. A few cases in bad order were put in good order under the supervision of the railroad inspector and were stamped O. K. by him before 4 o'clock of that day (R. 43, 46, 49, 52, 53).

Location of the sardine shipment on the wharf and that of the Railroad Company's cars was pointed out on the sketch, Ex. B, by the Steamship Company's dock superintendent (R. 48, 80 L).

FIRST POINT

THE FACT FINDING OF THE TRIAL COURT THAT THE STEAMSHIP COMPANY HAD MADE DUE DELIVERY OF THE SARDINE SHIPMENT TO THE WHARF COMPANY IS SUFFICIENTLY SUPPORTED BY EVIDENCE.

Unless it can be said that there was no evidence whatever to support the trial court's finding that the Steamship Company delivered the shipment to the Wharf Company, the contentions put forward here by the petitioner (Wharf Company) and by the Railroad Company do not raise a question for review by this Court so far as the Steamship Company is concerned.

In *Dooley* v. *Pease,* 180 U. S. 126, 131-132, this Court said:

"Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different. Stanley *v.* Supervisors, 121 U. S. 547.

"Errors alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals, or by this court, if there was any evidence upon which such findings could be made."

In *U. S.* v. *U. S. F. & G. Co.,* 236 U. S. 512, 527, this Court said:

"The findings have the same effect as the verdict of a jury, and this court does not revise them, but merely determines whether they support the judgment."

The finding of the trial court that the Steamship Company had made delivery was affirmed three times on appeal in the Texas courts, a circumstance which would be of great weight here even if the findings of fact of the trial court were open

to review—which they are not in a common law case as distinguished from an equity case. See *Baker* v. *Schofield*, 243 U. S. 114, 118.

A finding of fact which can be supported by permissible inferences from the evidence will not be disturbed on appeal simply because different inferences could have been drawn from the same evidence. This was recognized by the court below (R. 148-149) and is unquestionable law. In *Jones* v. *Clark*, 272 Mass. 146, 149, the Supreme Court of Massachusetts recently said:

"We cannot review the inferences drawn by the trial judge. The only question in this connection is whether the inference was permissible; it is not whether we should draw the same inference."

And in *Aronson* v. *Pearson*, 199 Cal. 295, 303, it is said:

"But where the evidence is sufficient to support conflicting inferences the finding of the trial court either way thereon is conclusive on appeal."

There was undisputed testimony on the trial to the effect that the shipment had been placed in the territory where, according to the established practice of long standing, the wharf company would lift the same without further action on the part of the Steamship Company, whenever it suited the convenience of the Wharf Company forces in the course of loading the steamer's cargo into cars. The shipment was stamped with the o. k. of the Railroad Company's inspector as ready to go forward before 4 P. M. January 13 and a railroad car had been placed there the night before to load this very shipment. Two other carload shipments for the Railroad Company placed in the same territory near the sardines about the same time were loaded without any notice or further action on the part of the Steamship Company.

The Wharf Company's forces worked until 7 P. M. in loading the cargo, and would by that time have loaded this cargo also without any action on the part of the Steamship Company if in the exercise of their discretion they had not preferred other shipments or had not been diverted to other work. It was the Wharf Company's general manager who testified (R. 67-68):

"They have electric conveyors, but the custom there is to place the cargo in certain places as much as possible. There is, in a general way at least, a kind of an assigned territory there for different rail lines. The cars are spotted opposite in the same manner. The night before this boat got to Galveston both the Galveston Wharf Company and the G. H. & S. A. should have known from the billing that there was a car of sardines on that boat destined for El Paso routed over the G. H. & S. A. or S. P. Our forces are at liberty to begin the loading as soon as the freight is put on the wharf, but the practice is to wait until there is a sufficient amount deposited there to keep the labor busy. Otherwise it is not a paying investment. It is our privilege to begin loading as soon as it is put on the wharf, unless a hold order is put on some specific shipment, which happens only occasionally. So that as soon as freights were deposited on the wharf by the forces of the Mallory, there was nothing to prevent our forces from immediately picking it up and trucking it to the cars. That was all left to the judgment and discretion of the Galveston Wharf Company's supervisor of forces on the docks. It was not a matter within the control of the Mallory Line."

* * * * * * *

"On the day of the fire these cars had been spotted in the usual manner and the cars were there. As the freights were placed on the wharf by the Mallory Line, it was purely a matter of the Wharf Company to determine just how and when to load the particular shipment in the usual manner."

And he testified further (R. 70):

"After this shipment had been placed at the designated point, you ask what else in the further handling of that shipment was to be done by the Mallory. There was the coopering

feature. After this had been o.k.'d and it was all right in every respect and deposited there by the Mallory Line, the next thing in order would have been the loading into the cars by our forces if it was ready to go. It is the Mallory Line's usual performance to deposit it on the floor, and it is picked up and loaded into the cars by the Galveston Wharf Company. As to the particular time it is picked up, that is wholly in control of the Wharf Company. After it had been placed and was o.k.'d to go we were at liberty to pick it up and send it forward at any time we got ready, and it was not necessary for us to ask permission of the Mallory Line about it."

* * * * * * *

"The Mallory Line never has required so far as that boat is concerned for us to give them a receipt for what we picked up before we loaded it. If they had requested it, I am sure they would not have got it."

It was testified by the Steamship Company's Chief Dock Clerk that the shipment after being placed in the territory was reconditioned as to a few damaged packages and stamped o.k. by the Railroad Company's inspector as ready to go forward, and that this was before four o'clock on the same day (R. 52, 53).

The evidence just referred to taken in connection with other evidence mentioned in the earlier part of this brief demonstrates ample support for the findings of the trial court in respect of delivery by the Steamship Company.

SECOND POINT

THE AUTHORITIES SUPPORT THE FINDING THAT THE STEAMSHIP COMPANY MADE DUE DELIVERY AND THE CONCLUSION THAT IT WAS RELIEVED FROM LIABILITY.

The facts and circumstances of the case at bar in respect of the matter of delivery by the Steamship Company do not differ in substance from those which appeared in *Pratt* v. *Railway Co.*, 95 U. S. 43. There the Grand Trunk occupied a section in the Michigan Central depot at Detroit into which it unloaded freight arriving by its line. It employed men who checked the freight coming into this section. It paid the Michigan Central for the use of this section a fixed compensation per hundred weight, covering the unloading by Michigan Central employees in a particular place in such section of its incoming freight destined to go out over the Michigan Central, and from this spot such freight was loaded into the Michigan Central cars by the latter's employees, when they were ready to load it. After the goods were placed in such special place they were not further handled by the Grand Trunk. When the Michigan Central agent observed goods deposited in said section occupied by the Grand Trunk destined over the Michigan Central road, he would call upon the Grand Trunk agent and inspect the way bill and from the information thus obtained would prepare a Michigan Central way bill. The goods there in question arrived on the Grand Trunk line and were deposited at the place in the Grand Trunk's section at the place for goods destined out over the Michigan Central. The Grand Trunk's employees

checked them into such place from the Grand Trunk way bill. This Court said (46):

"We are all of the opinion that these acts constituted a complete delivery of the goods to the Michigan Central Company by which the liability of the Grand Trunk Company was terminated.

"1. They were placed within the control of the agents of the Michigan Company.

"2. They were deposited by the one party and received by the other for transportation, the deposit being an accessory merely to such transportation.

"3. No further orders or directions from the Grand Trunk Company were expected by the receiving party. Except for the occurrence of the fire, the goods would have been loaded into the cars of the Michigan Central Company, and forwarded, without further action of the Grand Trunk Company.

"4. Under the arrangement between the parties the presence of the goods in the precise locality agreed upon, and the marks upon them, P. & F., St. Louis, were sufficient notice that they were there for transportation over the Michigan road toward the City of St. Louis; and such was the understanding of both parties."

This Court cited *Merriam* v. *Hartford & New Haven Railroad Co.*, 20 Conn. 354, and *Converse* v. *Norwich & New York Transportation Co.*, 33 Conn. 166, as "strong decisions".

In *Merriam* v. *Hartford & New Haven Railroad Company*, 20 Conn. 354, it was held that if a practice by a carrier is shown to receive property for transportation when deposited at a particular place without express notice, such deposit amounts to notice and is a delivery.

In *Converse* v. *Norwich & New York Transportation Company*, 33 Conn. 166, a through shipment from New York to Stafford, Connecticut, was transported by defendant to New London and there discharged into a depot building on the wharf where it was destroyed by fire. The tracks of the New

London Northern Railway Company, the connecting carrier, led from the wharf, and the goods were deposited by the defendant in the usual place of deposit for freight brought by them destined for points on the line of the railroad. The practice was for the defendant's agents to make out a way bill and hand it to the agent of the railroad and for the latter to load the freight on board their cars, taking it from the place where the defendants were accustomed to deposit it and checking each article upon the way bill as it was taken up. If any article described in the way bill was in bad order, the defendants were expected to put it in good condition. The depot was built by the railroad and the privilege of using the same leased to the defendant under an agreement for joint traffic.

The Court held that by the deposit there was a delivery to the railroad, saying (pp. 182-3):

"It is clear then that both the transportation company and the northern road contemplated that the placing of freight by either intended for the other upon that platform was all that either was to do by way of delivery of their freight to each other; that they did not contemplate such placing as an intermediate deposit, to be watched by the party depositing, or as a joint deposit, at the joint risk and in the joint possession of both; but that they relied upon the enclosure as a protection, and considered the placing of the freight in the usual spot upon the platform a delivery.

The minor facts respecting the time and manner of delivering the way-bills—the examination of the freight, and checking of the way-bills to be sure that all had been delivered—the proportionate extent and the manner of their joint use and possession of the depot—the looking up and paying for missing goods—and the practice of letting the Saturday freight remain on the platform until Monday morning—are only material as they bear upon the great question, namely, what was it agreed and understood between the defendants and the northern road should constitute a delivery from one to the other."

Washburn Crosby Co. v. *Boston & Albany Railroad,* 180 Mass. 252, involved the question of constructive delivery by that railroad to a connecting steamship company. The wharf belonged to the railroad but a portion was used and occupied for the purpose of receiving goods by the steamship company, whose superintendent had an office there. A shipment of flour was placed on this part of the wharf. The defendant had given the steamship company notice by letter that the unloading of steamship freight at that place constituted delivery by defendant and therefore it assumed no responsibility. Holmes, *C. J.,* said (pp. 255-256):

"The plaintiff also adverts to the fact that the bags of flour were counted before being put on board the steamer as something remaining to be done before delivery was complete. But this last matter may be dismissed, as at least it might have been found to be a precaution taken by the steamship company solely for its own satisfaction after delivery to it. The bags were counted by the defendant when they were taken from the car to the wharf."

* * * * * * *

"If then, as might have been found, it was understood in advance that as soon as goods were left on the wharf by the railroad the steamship company was free to take them at its pleasure and that it was expected to take notice of their presence and assume responsibility for them without more special notification, the deposit of the flour on the wharf was an actual delivery without more."

In *Aetna Insurance Co.* v. *Wheeler,* 49 N. Y. 616, a through shipment under a joint rate by water line connecting with a railroad line was discharged by the water line upon its wharf and carried to a warehouse alongside the railroad's tracks by a concern whose services were paid for jointly by the two carriers. Notice of such deposit in the warehouse was thereupon given to the railroad. When the railroad was ready to forward the goods, its cars were run alongside the

warehouse and loaded. The Court referred to *Coyle* v. *Western Railroad Corporation*, 47 Barbour, 152, where it was held that placing barrels in the usual place of delivery to a forwarder for transportation, although the same were not in the particular instance counted, tallied or receipted for as usual between the parties, placed them in possession of the forwarder as a common carrier. The Court also referred to *Converse* v. *The Norwich Transportation Co.* (cited *supra*) and said (p. 622):

"In the present case, the flour was not only deposited in the usual place, but notice was given to the defendants, who entered it upon their books. From this time it must be held to have been in the possession of the defendants as common carriers."

It was also said that the fact that the key was in the possession of the water line was not material as there was no pretense, "but that property placed where this was, was taken and transported by defendant at its pleasure" (p. 622).

In *E. L. & R. R. Railway Co.* v. *J. D. Hall*, 64 Texas, 615, where it was alleged that bales of cotton which were destroyed in a fire had been delivered to the railroad, it appeared that the cotton had been delivered on the platform and a portion thereof had been tagged for shipment under an order from the station agent to tag and load the whole, and a part had been loaded into cars. It was said that the numbering and counting of the cotton to be done before acceptance might nevertheless be postponed by the agent until after acceptance. The Court said (p. 620):

"The question was, had the defendant accepted the cotton—not had all been done that ought to have preceded acceptance".

It was held that the question of delivery was a question of fact for the jury.

In *Texas & Pacific Railway Co.* v. *Clayton*, 173 U. S. 348 (relied on at page 10 of the Petition for Certiorari), where the goods were deposited upon a wharf belonging to the railroad company, but from which the steamship company was obligated by contract to take the same within a reasonable time, it appeared that at the time the particular lots to be loaded on the steamer were being pointed out by the railroad company's employee and being loaded, the goods remaining on the wharf were destroyed by fire. The bill of lading contained the provision that the carrier in whose "actual custody" the goods should be at the time of loss should "alone" be liable therefor. This Court said as to the clause in that bill of lading (p. 355):

"The first thought suggested by these clauses, taken together, is that the parties recognized the possibility that it might be often difficult to determine what, as between carriers, in view of their relations to each other, would constitute a sufficient delivery to the connecting carrier. And in order to meet that difficulty the clause relating to actual custody was added, so as to indicate that the delivery intended, so far as liability to the shipper for loss was concerned, was not a constructive one, but such a delivery as involved actual custody of the cotton by the connecting carrier."

It was held that "actual custody" meant the physical possession of the goods. This Court said (p. 362):

"It is the clause of that character in the bill of lading now in suit which makes the judgment in the *Pratt, Converse* and *Merriam cases* inapplicable to the present case."

THIRD POINT

THE CIRCUMSTANCES MENTIONED BY THE WHARF COMPANY AND THE RAILROAD COMPANY DO NOT IMPAIR THE FINDING OF THE COURTS BELOW THAT DELIVERY WAS MADE BY THE STEAMSHIP COMPANY.

I. CONCERNING WHARFAGE

It is said that the Wharf Company makes a tariff wharfage charge to the vessel, and that the only service rendered the railroads for which the Wharf Company is paid is the lifting and loading of the cargo and switching to the railroad connection, and that therefore the Wharf Company cannot be deemed to receive delivery of any shipment until it is actually lifted by it to load into the cars.

The wharfage charge against the vessel according to the tariff is a single charge of so much per hundred weight or other unit of cargo discharged on the wharf, not a per diem charge, and is earned when the cargo is placed on the dock in the designated territory for the purpose of being lifted and loaded into cars by the Wharf Company. The Steamship Company furnished a statement of the cargo tonnage and the charge was on that for the use of the pier (R. 60). It was the duty of the Railroad Company under the through traffic arrangements and the bill of lading to receive and continue the transit of the shipment. It was a shipment in transit and not a shipment on dock awaiting delivery to a consignee. In order to perform its service to the Railroad Company, of lifting and loading the cargo, possession by the Wharf Company was first necessary. Having

taken or assumed possession it was in order for the Wharf Company to defer lifting and loading until such time as should meet its convenience. Its forces had been put to work on loading into cars the cargo discharged from the steamer and were proceeding generally with the execution of such task, selecting shipments at their convenience, all equally at their disposal, without any further action of the Steamship Company. The inspector of the Railroad Company had already placed his O. K. stamp on the shipment as ready to go, which was notice thereof to the Wharf Company. There is no inference from the tariff that possession had not been taken by the Wharf Company for the purpose of performing its service under the tariff as convenient. There was in the circumstances here no inference of an intermediate state of control after the shipment was placed in the designated territory and stamped O. K. by the Railroad representative.

II. Concerning Diversion

It is also said that the testimony as to diversion or reconsignment negatives delivery. After the billing or way bill had been received by the Steamship Company and turned over to the Wharf Company and by them to the Railroad, all of which preceded the arrival of the steamer, it would be necessary if reconsignment or diversion was requested to take the matter up with the Railroad, which had possession of the document, and arrange a diversion with them. Obviously it would be necessary to recover the way bill and make the necessary change in it. The Railroad as a party to the through contract was a necessary factor in the diversion. There was no reservation in this respect in the Steamship

Company. The Steamship Company's Dock Superintendent only testified: "We would have endeavored to have a diversion" (R. 47). Question of diversion would not arise in absence of request from shipper or consignee. The Steamship Company had no right to initiate diversion.

III. Concerning Policing

The fact that the Steamship Company policed the wharf is also advanced as negativing delivery. The testimony is that the shipments were policed by the Steamship Company "in part" (R. 51). The written agreement between the Wharf Company and the Steamship Company provides that the Steamship Company shall "pay the salaries of sufficient police watchmen to protect the property hereinabove described, and also pay its pro rata of the expense of one day and one night police sergeant". The Steamship Company used the wharf also for its local business in which the Wharf Company had no interest, and it was appropriate enough in the circumstances for the Wharf Company to require the Steamship Company to pay a portion of the expense of policing. It does not appear whether the police watchmen were retained by the Wharf Company or the Steamship Company but only that the Steamship Company agreed to pay their salaries, and it does appear inferentially that the Wharf Company was to pay watchmen at least in part. The whole subject of policing ws evidently a general one, having no reference to the responsibility for any particular shipment on the wharf.

IV. Concerning Salvaging

It is also advanced as a circumstance negativing delivery that the Steamship Company attended to the salvage after the fire. Like the other intentions, this seems like

grasping at a straw. The Steamship Company, regardless of responsibility for the through shipments, had other shipments and property affected by the fire in which it was interested or for which it was responsible. The Galveston Wharf Company piers were destroyed in the fire (R. 57), and much property in which the Steamship Company was not interested must have been involved. Apparently some loaded cars were burned (R. 76). It was necessary that some one should undertake the salvage. Salvage service is properly undertaken by anybody even a stranger and imports nothing as to the salvor's relationship to the property.

V. Concerning Notice of Readiness

It is also asserted that notice from the Steamship Company to the Wharf Company that the shipment had been put in order and stamped ready to go was required as a condition of delivery. The testimony is that the shipment had been placed in the designated territory and put in order and that the Railroad Company's inspector had supervised the putting in order and stamped his O. K. on the packages as ready to go. This was at least notice by the Railroad Company as the principal to the Wharf Company as its agent. All the other shipments were loaded out without any notice from the Steamship Company, including two adjacent carloads for the same Railroad Company. The testimony is that after the O. K. no further action by the Steamship Company was expected.

These several circumstances were considered by the Courts below. They have no greater bearing than the immaterial circumstances mentioned in the cases we cite in our Second Point at pp. 20-22, *supra*.

FOURTH POINT

THE WHARF COMPANY IN RECEIVING DELIVERY FROM THE STEAMSHIP COMPANY ACTED EITHER AS THE AGENT OF, OR AS A SUB-CONTRACTOR FOR, THE RAILROAD COMPANY AND THE STEAMSHIP COMPANY WAS BY SUCH DELIVERY RELIEVED OF FURTHER RESPONSIBILITY IN RESPECT OF THE SHIPMENT.

Assuming delivery, it is immaterial to the Steamship Company whether the Wharf Company was an agent or a sub-contractor. It is the view of the Steamship Company that it was one or the other.

In *Missouri Pacific Railroad Company* v. *Reynolds, Davis Grocery Company*, 268 U. S. 366, the through bill of lading designated the Missouri Pacific as the delivering carrier. At destination its line did not reach the place of delivery of the shipment and it delivered the same to the St. Louis and San Francisco to complete the transit and make the delivery, paying a tariff charge to the latter for such service. The St. Louis and San Francisco was not named in the through bill of lading and did not receive any part of the joint through rate. It was held to be the "agent" of the Missouri Pacific for the purpose of making the delivery. Possibly the opinion uses the word "agent" in the broad sense of a representative such as a sub-contractor. The case at bar is not distinguishable in principle from this decision. The Railroad Company was party with the Steamship Company to a joint through bill of lading under a through rate requiring the Steamship Company to deliver at Galveston and the Railroad Company to receive the shipment there as the connecting carrier. The Steamship Company was not a land carrier and the Railroad

Company must therefore, in order to perform its contract, arrange for a connection with the water line. The Railroad Company did not connect immediately with the water line, but the Wharf Company's railroad provided a connecting link. It therefore employed the Wharf Company for the latter's tariff charge to receive delivery for it from the Steamship Company at the wharf in order to enable it to perform its contract. As in the *Missouri Pacific* case the Wharf Company was not named in the bill of lading and did not receive any part of the joint through rate (R. 66, 68).

Under the *Missouri Pacific* decision the delivery by the Steamship Company to the Wharf Company was delivery to the Railroad Company in accordance with the bill of lading and the Steamship Company was by such delivery relieved of responsibility.

Even if the Wharf Company was a common carrier and performing a common carrier service at the time, it was performing such service as the agent or subcontractor of the Railroad Company.

LAST POINT

IT IS RESPECTFULLY SUBMITTED THAT THE DECISION OF THE SUPREME COURT OF TEXAS SHOULD BE AFFIRMED WITH COSTS IN SO FAR AS IT RELIEVES THE STEAMSHIP COMPANY FROM LIABILITY.

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Of Counsel

New York City
January 18, 1932

SUPREME COURT OF THE UNITED STATES.

No. 411.—October Term, 1931.

Galveston Wharf Company et al., Petitioners, *vs.* Galveston, Harrisburg & San Antonio Railway Company et al. } On Writ of Certiorari to the Supreme Court of the State of Texas.

[March 14, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The American Grocery Company and others brought this action against the Mallory Steamship Company, the Galveston Wharf Company, and the Galveston, Harrisburg & San Antonio Railway Company to recover the value of a carload of sardines destroyed by fire at Galveston, Texas, while en route to El Paso in that State. The goods had been shipped from Maine to El Paso on a through bill of lading issued by the Seaport Navigation Company and describing the route as "Mallory, Southern Pacific." The Mallory Steamship Company had transported the goods from New York to Galveston and at the time of the fire the goods were on the pier which that company had leased from the Galveston Wharf Company. The latter company, a chartered transportation company not named in the bill of lading, owned, in addition to certain piers, railroad trackage from these piers to connections with railroads running out of Galveston, including that of the Galveston, Harrisburg & San Antonio Railway Company, that being the Southern Pacific line described in the bill of lading as the delivering carrier. There was no attempt to prove negligence on the part of any of the defendants. The District Court, a jury being waived, held that the goods had been delivered by the Mallory Steamship Company to the Galveston Wharf Company, that the latter was in possession of the goods as a common carrier, and that at the time of the loss they had not been delivered to the Galveston, Harrisburg & San Antonio Railway Company. The judgment, entered in the District Court against the Wharf Company, was reversed by

the Court of Civil Appeals which directed judgment against the Railway Company upon the ground that the Wharf Company was acting as a transfer agent for the Railway Company and was not liable for the loss. The Supreme Court of the State reversed the judgment of the Court of Civil Appeals and affirmed that of the District Court. This Court granted a writ of certiorari.

The Wharf Company, petitioner, in the view that the question of the liability of carriers under an interstate bill of lading is governed by the Federal decisions,[1] contends that the state court erred in holding (1) that the possession of the shipment at the time of the fire had passed from the Steamship Company to the Wharf Company, (2) that the Wharf Company had possession as a connecting carrier and not as agent of the railroad carrier named in the bill of lading, and (3) that the Wharf Company was liable as insurer of the shipment when its filed tariff provided that it should not be liable save for its negligence. The American Grocery Company, plaintiff in the action (which joined in the Wharf Company's petition for certiorari) contends that it is entitled to recover "from some one of the three defendants in the trial court" and that it is the Steamship Company which should be held liable. The Railway Company, respondent, also urges that there had been no delivery of the goods by the Steamship Company, and further that, if such delivery had been made, the Wharf Company held the goods as common carrier and not as the Railway Company's agent, and that the tariff of the Wharf Company was inapplicable.

First. The Court of Civil Appeals, while reversing the judgment of the District Court, did not disturb the finding that the Steamship Company had delivered the goods to the Wharf Company, but on the contrary reaffirmed it. The Supreme Court held that this finding was supported by evidence and reached its conclusion upon that basis. The petitioners insist that the three courts were in error and that the finding is opposed to the undisputed evidence. We are unable to agree with this contention. The tracks of the Wharf Company were on the pier and there the Steamship Company and the Wharf Company had adjoining of-

[1] Southern Railway Co. *v.* Prescott, 240 U. S. 632, 636; Georgia, Florida & Alabama Railway Co. *v.* Blish Milling Co., 241 U. S. 190, 194, 195; Missouri Pacific R. R. Co. *v.* Reynolds-Davis Grocery Co., 268 U. S. 366.

fices. The Wharf Company had its own force of men on the pier to handle the shipments for rail transportation. It was the practice to have cars spotted conveniently to receive the shipments according to the routing. The Steamship Company placed the goods on the pier in convenient locations where the Wharf Company, which according to custom had already received the billing and had full information of the shipments, could load them into the waiting cars.[2] In the instant case, it appeared that the ship had arrived early in the morning (January 13, 1926) and had been fully discharged by five-thirty o'clock in the afternoon; that, as the goods were unloaded, they were put in the usual manner in suitable locations for the picking up and loading into cars by the Wharf Company; that out of 1081 tons so discharged on that day and put in the designated places, the Wharf Company had actually loaded into cars all but 379 tons, and that carloads similarly routed, and placed in approximately the same location as the shipment here involved, had been so loaded. There was evidence that the latter shipment had been suitably placed on the wharf before four o'clock in the afternoon, and was ready by that time for loading by the Wharf Company and completely at its

[2]The testimony of the General Manager of the Wharf Company contains the following:

"It is our privilege to begin loading as soon as it is put on the wharf, unless a hold order is put on some specific shipment, which happens only occasionally. So that as soon as freights were deposited on the wharf by the forces of the Mallory, there was nothing to prevent our forces from immediately picking it up and trucking it to the cars. That was all left to the judgment and discretion of the Galveston Wharf Company's supervisor of forces on the docks. It was not a matter within the control of the Mallory Line. . . . As the freights were placed on the wharf by the Mallory Line, it was purely a matter of the Wharf Company to determine just how and when to load the particular shipment in the usual manner. . . . It is the Mallory Line's usual performance to deposit it on the floor, and it is picked up and loaded into the cars by the Galveston Wharf Company. As to the particular time it is picked up, that is wholly in control of the Wharf Company. After it had been placed, and it was O. K.'d to go, we were at liberty to pick it up and send it forward at any time we got ready, and it was not necessary for us to ask permission of the Mallory Line about it. Unless there is some special feature connected with it, as a hold order, the usual course is to load it and get rid of it. So far as the actual physical handling of the shipment from the time it is put, and assuming that it is ready to go, that is under the control of the Wharf Company."

disposal,[3] but the Wharf Company stopped work about six-thirty o'clock without loading it, and that it was burned that night. Questions are raised with respect to notice of readiness for loading and as to the checking of the shipment, but it cannot be said that the testimony is so clear and definite on these subjects as to preclude a finding of delivery to the Wharf Company. No receipt had been given by the Wharf Company, but the State court found, upon evidence, that the Steamship Company did not require the Wharf Company to give receipts before it removed shipments from the wharf and that receipts were often given a considerable time after such removal. On points where the testimony permitted conflicting inferences, the State court was entitled to reach its conclusion that the shipment had been placed under the complete control of the Wharf Company to be handled according to its own convenience and hence should be deemed to have been delivered to the Wharf Company.[4]

Second. The Wharf Company did not dispute that it was a common carrier. As such, it had facilities and rendered service. It is also manifest that it received the goods for transportation to the connection with the Railway Company that was to take them to destination. This service of the Wharf Company was that of a

[3] There was testimony by the chief dock clerk of the Steamship Company as follows:

"After we placed the shipment in the designated territory, that is all we have to do with it. If we have broken cases, we set them aside, and the Mallory Line coopers come along and put them into condition, and we are through with it, and it is ready for the Wharf Company to load out. . . . Some of these packages were broken, not a large amount. They were put into condition that day. I would say that this particular carload of sardines was ready to be put on the cars before 4:00 o'clock. After that time we had nothing to do with it. The Mallory Line was through with it. As to whether any of the representatives of the Wharf Company or railroad company had examined this shipment, I say they had. When the damaged cases were recoopered, they put the O. K. mark on them after we recoopered them."

[4] See Pratt *v.* Railway Company, 95 U. S. 43, 46; Merriam *v.* Hartford & New Haven Railroad Co., 20 Conn. 354; Converse *v.* Norwich & New York Transportation Co., 33 Conn. 166; Washburn Crosby Co. *v.* Boston & Albany Railroad Co., 180 Mass. 252; Texas & Pacific Rwy. Co. *v.* Clayton, 173 U. S. 348; Texas & Pacific Rwy. Co. *v.* Reiss, 183 U. S. 621; Texas & Pacific Rwy. Co. *v.* Callender, 183 U. S. 632; Oregon-Washington Co. *v.* McGinn, 258 U. S. 409, 413.

common carrier furnishing a necessary link in the transportation under the through bill of lading. The Wharf Company was thus in fact and in law a connecting carrier, and that it was not named in the bill of lading is unimportant. The bill of lading, required to be issued by the initial carrier upon an interstate shipment, 'governs the entire transportation and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid.' *Georgia, Florida & Alabama Railway Co.* v. *Blish Milling Co.*, 241 U. S. 190, 194, 195. See, also, *Kansas Southern Railway Co.* v. *Carl*, 227 U. S. 639, 648; *Great Northern Railway Co.* v. *Galbreath Cattle Co.*, 271 U. S. 99, 102. Under such a bill of lading, each connecting carrier may be sued for damages occurring while the goods are in its possession, and its liability 'is fixed by the applicable valid terms of the original bill.' It may not vary the terms of the through bill. *Missouri, Kansas & Texas Railway Co.* v. *Ward*, 244 U. S. 383, 387; *Texas & Pacific Railway Co.* v. *Leatherwood*, 250 U. S. 478, 480; *Cobb* v. *Brown*, 193 Fed. 958. In this instance, the bill of lading provided that the carrier in possession of the property described "shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided." The Wharf Company became subject to this liability and did not bring itself within any of the exceptions stated in the bill.

The Wharf Company was not entitled to escape this liability upon the ground that it was acting as the agent of the Railway Company. The case of *Missouri Pacific Railroad Co.* v. *Reynolds-Davis Grocery Co.*, 268 U. S. 366, upon which the petitioners rely, is not in point. There, the Missouri Pacific, the delivering carrier named in the bill of lading, had employed the St. Louis-San Francisco to perform a switching service in making the required delivery at the place of destination. The court held that the Missouri Pacific was the delivering carrier and was liable as such; it could not defeat that liability by the employment of an agent for service at the terminal. In the present case, the Wharf Company was the connecting carrier in possession of the goods at the time of the loss and was responsible accordingly.

Third. Equally unavailing is the Wharf Company's defense based upon the provision of its filed tariff, that it should be liable only for negligence. The respondent, the Railway Company, in-

sists that this limitation was by its terms applicable only in connection with the rate for the handling of traffic after it had been loaded into cars and that another rate without such limitation related to the service in loading the goods from the wharf into the cars. Apart from this contention, which is not without force, it is sufficient to say that the attempted limitation of liability in any event did not affect the plaintiffs who were entitled to the transportation of the goods under the conditions set forth in the through bill of lading pursuant to which the Wharf Company was performing its service. As we have said, the Wharf Company was not entitled to vary the liability, as determined by the terms of the through bill, by its arrangements with the Railway Company.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.